155-685

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 841.

HIRAM P. McKNIGHT, PLAINTIFF IN ERROR,

vs.

CHARLES C. JAMES, WARDEN OF THE OHIO PENITENTIARY.

IN ERROR TO THE CIRCUIT COURT OF OHIO FOR THE SECOND JUDICIAL CIRCUIT.

FILED NOVEMBER 10, 1894.

(15,725.)

(15,725.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 841.

HIRAM P. McKNIGHT, PLAINTIFF IN ERROR,

vs.

CHARLES C. JAMES, WARDEN OF THE OHIO PENITENTIARY.

IN ERROR TO THE CIRCUIT COURT OF OHIO FOR THE SECOND JUDICIAL CIRCUIT.

INDEX.

	Original.	Print.
Return to writ of error	1	1
Writ of error	2	1
Petition for writ of error	5	2
Bill of exceptions	8	3
Testimony of Hiram P. McKnight	9	4
Exhibits offered	10	4
Judge's certificate	11	4
Exhibit A—Transcript of docket and journal entries and record on motion for leave to file a petition in error in the supreme court of Ohio	12	5
Docket entries, &c.	12	6
Notice and service	13	6
Motion for leave to file petition in error	14	7
Petition in error	16	8

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., DECEMBER 11, 1894.

	Original	Print.
Exhibit A—Certified copy of final record	21	11
Indictment	21	11
Motion to quash	26	15
Order appointing assistant prosecutor	27	15
Order denying motion to quash, &c	27	16
Motion for continuance	28	16
Order denying continuance	28	16
Defendant's request to charge	29	17
Charge of the court	30	18
Verdict	34	20
Motion for new trial	35	21
Affidavit of Frank A. Baldwin	35	22
Affidavit of Hiram P. McKnight	37	23
Order overruling motion for new trial	38	24
Judgment	38	24
Order allowing compensation to assistant prosecutor	38	24
Order allowing bill of exceptions	39	25
Petition in error	39	25
Waiver of citation	41	26
Judgment and mandate	41	26
Clerk's certificate	42	27
Exhibit B—Affidavit of Baldwin	43	28
Exhibit A—Motion to discharge attachment	45	28
Exhibit B—Extract from final record	46	29
Clerk's certificate	49	31
Exhibit B—Certified copy of journal entries	50	31
C—Certificate of sentence	52	32
Docket entries	54	32
Order refusing writ of *habeas corpus*	55	33
Petition for writ of *habeas corpus*	56	33
Return to writ of *habeas corpus*	60	35
Reply to return	64	36
Sheriff's return	69	38
Clerk's certificate	71	39
Clerk's certificate	73	39
Citation	75	40
Proof of service of citation	76	40

1 *Return to Writ of Error.*

To the honorable justices of the Supreme Court of the United States:

Pursuant to a writ of error issued from your honorable court to the circuit court of Ohio, second judicial circuit, in and for the county of Franklin, a copy of said writ having been first filed in this our circuit court, in a certain proceeding wherein "The State of Ohio *ex rel.* Hiram P. McKnight" was plaintiff and "Charles C. James, warden Ohio penitentiary," was defendant, I hereby make return to said writ of error, which is hereto attached, according to the mandate thereof, by attaching hereto and returning herewith, as a part of this return, under the seal of our said circuit court, a true and complete transcript of all the record of said proceedings, including all pleadings, writs, returns, journal entries, and orders made therein and bill of exceptions.

I further certify that I am the legal custodian of all the files, records, journals, and seal of said circuit court.

Witness the Hon. Gilbert H. Stewart, chief justice of the circuit court of Ohio, second judicial circuit, in and for Franklin county, Ohio, this 17th day of October, A. D. 1894.

[Seal Circuit Court, Franklin County, Ohio.]

Clerk of the Circuit Court of Ohio, Second Judicial Circuit, in and for Franklin County, Ohio.
CHAS. F. GALLOWAY,
Clerk of Circuit Court.

2 *Writ of Error to State Court.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable Gilbert H. Stewart, chief justice of the circuit court of Ohio, second judicial circuit, Greeting:

Because in the record and proceedings, also in the rendition of the judgment of a plea which — in the said circuit court of Ohio, second judicial circuit, before the said chief justice of said circuit court, sitting at chambers, being the highest court of law or equity of the said State in which a decision could be had in the suit between "The State of Ohio *ex rel.* Hiram P. McKnight *vs.* Charles C. James, warden Ohio penitentiary," wherein was drawn in question an authority exercised under said State on the ground of it being repugnant to and in violation of the Constitution and laws of the United States, and the decision was in favor of its validity, and wherein was drawn in question the construction of a clause of the Constitution and statutes of the United States, and the decision was against the right, privilege, exemption, and protection spe-

cially set up and claimed under the clause of the United States Constitution and statutes so claimed, and where- there was drawn in question a right, privilege, immunity, and protection claimed by plaintiff under the Constitution and laws of the United States, and the decision was against such right, privilege, immunity, and protection so claimed, a manifest error hath happened, to the great damage of the said Hiram P. McKnight, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so

3 that you have the same at Washington, D. C., within 30 days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the sixth day of October, in the year of our Lord 1894.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

4 [Endorsed:] Ohio *ex rel.* McKnight *vs.* Charles C. James, warden Ohio penitentiary. Writ of error to State court.

5 To the Honorable Henry B. Brown, one of the associate justices of the Supreme Court of the United States:

Hiram P. McKnight, your petitioner, respectfully represents that, before the Hon. Gilbert H. Stewart, chief justice of the circuit court of Ohio, second judicial circuit, at chambers, in a certain cause there lately pending, wherein The State of Ohio *ex rel.* Hiram P. McKnight was plaintiff and Charles C. Jones, warden of the Ohio penitentiary, was defendant, the following final judgment and order was rendered by said court, to wit: That the said Hiram P. McKnight be, and he is hereby, remanded into the custody of the said Charles C. James, and the prayer in his petition and reply is denied.

That said chief justice of said court, sitting at chambers, is a court of last resort in the decision of said cause and there is no higher law or equity tribunal in the State of Ohio in which a decision may be had in said cause, and said judgment and order is final.

And that there was drawn in question in said cause the following matters, to wit:

There was drawn in question the validity of an authority exercised under the State of Ohio by said defendant on the ground of it

being repugnant to and in violation of the Constitution of the United States, and the decision was in favor of the validity of such authority.

Where there was drawn in question a right, privilege, immunity, and protection claimed by plaintiff under the Constitution and laws of the United States, and the decision was against the right, privilege, immunity, and protection so claimed under the Constitution and laws of the United States.

Where there was drawn in question the construction of section one of the fourteenth amendment to the Constitution of the United States and sections of the Revised Statutes of the United
6 States, and the decision was against the right and protection claimed thereunder. The decision of each of said questions by said State court of last resort was adverse to the right, privilege, exemption, immunity, and protection claimed by your petitioner; all of which more fully and at large appears, reference being had to the record of said cause accompanying and made part of this petition.

Wherefore your petitioner prays for a writ of error, directed to the Hon. Gilbert H. Stewart, chief justice of said court, at the city of Columbus, Ohio, from the Supreme Court of the United States, and for a citation to the said Charles C. James, warden of the Ohio penitentiary, according to the statute in such case made and provided.

HIRAM P. McKNIGHT, *Petitioner.*

Writ allowed.

HENRY B. BROWN.

7 [Endorsed:] Ohio *ex rel.* McKnight *vs.* Charles C. James, warden Ohio penitentiary. Complaint for writ of error

8 BILL OF EXCEPTIONS.

Index.

Plaintiff's:

McKnight's testimony	Page- 1 & 2
" "Exhibit A," certified record	" 3
Absence of counsel, "Exhibit A"	Page 16
Assignment of counsel for State	" 16
Arraignment of prisoner	" 16
Sentence	" 27
F. A. Baldwin's affidavit	" 32 & 33
"Exhibit A" to said affidavit (motion)	" 34
Journal entry refusing motion, "Exhibit B" to said affidavit	" 35
"Exhibit B" to bill of exceptions; J. E. of sentence	

Defendant's:

Copy of certificate of sentence, viz., warrant of commitment, "Exhibit C" and	Page 2

9 Before the Hon. Gilbert H. Stewart, one of the judges of the circuit court of Franklin county, second circuit, at chambers.

Proceedings in Habeas Corpus.

THE STATE OF OHIO *ex Rel.* HIRAM P. MCKNIGHT
vs.
CHARLES C. JAMES, Warden Ohio Penitentiary. } Bill of Exceptions.

Be it remembered that on the 31st day of August, A. D. 1894, before the Hon. Gilbert H. Stewart, one of the judges of said court, at chambers, the above-entitled cause came on for hearing.

Said plaintiff, to maintain and establish his cause, as set forth and alleged in his petition and reply filed therein, offered himself as a witness and, being first duly sworn, testified as follows:

"I am Hiram P. McKnight and plaintiff in this cause. I was never sentenced upon any conviction for forgery and uttering forged instrument in the common pleas court of Wood county, Ohio, except in one case, and that was number 1168, wherein I was tried without counsel and was unable to procure counsel and did not waive

10 my right to have counsel, and the sentence of the court in that case was not the sentence a certificate of which is set forth in the warden's return in this case." To which testimony def't objected and the same was received subject to exception.

And further to maintain and establish his case he offered, and it was received in evidence, a duly authenticated transcript of the docket and journal entries and the record in the case of Hiram P. McKnight *vs.* The State of Ohio, heard in the supreme court of Ohio upon motion No. 2002, for leave to file petition in error to the circuit court of Wood Co., which is attached hereto and made part hereof and marked "Exhibit A."

And to further maintain and establish his said case he offered in evidence, and it was received, a duly authenticated transcript of the journal entry in said case in said common pleas court of the sentence pronounced by said court in said case, which is hereto attached and made part hereof and marked "Exhibit B."

This being all the evidence offered by plaintiff, the defendant, to maintain his said cause set forth in his return, offered in evidence (and the same was received) a certificate of sentence, a copy of which is hereto attached and made part hereof and marked "Exhibit C."

11 Counsel for defendant then requested that the court hold the case open that he might secure further evidence for defendant.

There being no further evidence offered by either party, and this being all the evidence offered in the case, and the same being submitted upon argument, the court reserved its decision for a future day. On the following day, to wit, September 1st, A. D. 1894, the said court rendered its decision therein, denying plaintiff's prayer

in his petition and reply and remanding him into the custody of the defendant, warden of the Ohio penitentiary; to which order the plaintiff excepted, and tenders this his bill of exceptions and prays that the same may be allowed, signed, sealed, and made a part of the record of said case, but not spread upon the journal of said court; which is done accordingly this 19th day of September, A. D. 1894.

GILBERT H. STEWART,
Judge of Circuit Court, Franklin Co., O.

12 "EXHIBIT A."

Supreme Court of Ohio, January Term, 1893.

Transcript of Docket and Journal Entries and Record.

HIRAM P. McKNIGHT } Motion for Leave to File a Petition in Error
vs. to the Circuit Court of Wood County.
THE STATE OF OHIO. }

Date.	Memoranda.
Oct. 20th, 1893.	Motion, notice, & brief of pl'tiff filed.
" 26th, "	"Ordered by the court that one Hiram P. McKnight, now confined in the Ohio penitentiary, being the plaintiff in a proceeding in error now pending in our court, and having requested to be heard in oral argument in his own behalf, and the case having been set for hearing for this day, the warden of the penitentiary is hereby directed to bring or cause him to be brought before this court at two o'clock p. m. this day. Whereupon, at two o'clock p. m., the warden of the penitentiary, by his deputy, produced the said Hiram P. McKnight in our said court, and he was heard in oral argument in his own behalf on a motion for leave to file a petition in error to the circuit court of Wood county, said motion being numbered 2002; the said Hiram P. McKnight was thereupon remanded to the custody of the warden of the penitentiary."
Oct. 26th, 1893.	Order of the court, addressed to Chas. C. James, warden of the Ohio penitentiary, to produce the plaintiff, Hiram P. McKnight, in court at 2 o'clock p. m., Oct. 26th, 1893, issued. Ordered delivered to J. L. Hampton, court messenger, for service. Order returned and filed endorsed: "Columbus, O., Oct. 26th, '93. Received a certified copy of the within order at 10.00 o'clock a. m.—C. C. James, warden O. P." "I hereby certify that I served the within order by delivering in person to C. C. James the certified copy of the within.—J. L. Hampton, messenger."

Date.	Memoranda.
Nov. 14th, 1893.	The court made the following order on the motion for leave to file a petition in error to the circuit court of Wood county: "Ordered by the court that said motion be, and the same is hereby, overruled;" which motion was numbered 2002 and entered in Book 13, page 225, order book.
Dec. 1st, 1893.	Original papers sent to clerk of courts of Wood county.

"Exhibit A."

13 *Legal Notice.*

To Andrew J. Mears, prosecuting attorney of Wood county, Ohio.

SIR: Notice is hereby given that Hiram P. McKnight intends to make application to the supreme court of Ohio, on the 10th day of October, 1893, for leave to file a petition in error to the circuit court of Wood Co., Ohio, to reverse judgment in said circuit court, rendered in the case of Hiram P. McKnight *vs.* The State of Ohio, affirming the judgment of the court of common pleas in said cause, for the following errors, viz:

Error in overruling motion to quash.
Error in overruling motion for continuance.
Error in trying prisoner without counsel.
Error in not assigning said cause for trial legally.
Error in refusing requests to charge Nos. 1 to 9, inclusive.
Error in charge as given.
Error in jury returning verdict.
Error in overruling motion for new trial.
Error of court in its remarks in presence of jury.
Error in ordering stenographer not to note exceptions, &c.
Error in admitting testimony objected to.
Error in admitting "Exhibits A and C."
Error in remarks of assistant prosecutor before jury.
Other errors appearing of record.

Errors in circuit court in sustaining and affirming judgment of common pleas, in that the verdict and judgment *is* not sustained by any evidence, and for other errors appearing.

Respectfully, H. P. McKNIGHT,
Plaintiff in Error.

Sept. 28, '93.

I hereby accept service of foregoing notice and waive defects, and also as to time.

ANDREW J. MEARS,
Prosecuting Atty, Wood County, Ohio.

Bowling Green, Ohio, Oct. 6, 1893.

14 In the Supreme Court of Ohio.

Motion for Leave to File a Petition in Error to the Circuit Court in and for Wood County, Ohio.

HIRAM P. MCKNIGHT, Plaintiff in Error,)
vs.
THE STATE OF OHIO, Defendant in Error.)

And now comes the above-named Hiram P. McKnight, plaintiff in error in the above entitled cause, and respectfully moves this honorable court for leave to file his petition in error to the circuit court of Wood county, Ohio, in said cause, to reverse a judgment of conviction upon an indictment for forgery, recovered in the court of common pleas of said county at its January, 1892, term thereof, which judgment *and* conviction was at the May, 1892, term of the circuit court of said county affirmed by said circuit court for errors appearing upon the trial of said cause and of record and for error in said circuit court sustaining and affirming said judgment *and* conviction, and more particularly as follows:

First. The court erred in overruling motion to quash the indictment.

Second. The court erred in placing the prisoner upon trial without counsel to assist him in his defense.

Third. The court erred in placing the prisoner upon trial of said cause (No. 1168) without first having assigned said cause for trial as provided by law.

Fourth. The court erred in overruling defendant's motion for a continuance the first time the case had been called for trial and without having been assigned for trial or any notice of trial having been given to the prisoner, and he being without counsel to prepare the same for trial and being confined in jail in custody of the sheriff.

Fifth. The court erred in refusing defendant's requests to charge, which were reduced to writing and numbered from 1st to 9th, inclusive.

15 Sixth. The court erred in its charge as given.

Seventh. It was error for the jury to return their verdict of "guilty as charged" in said cause into court before the case had been argued by counsel and submitted to them for deliberation.

Eighth. It was error for the court to overrule defendant's motion for a new trial upon each of the following grounds, viz:

1st. That there was irregularity in the proceedings of the court.

2nd. Erroneous rulings of the court during trial.

3rd. Misconduct of prosecuting attorney.

4th. Surprise which the prisoner with ordinary prudence could not have guarded against.

5th. That the verdict of the jury is not sustained by evidence and is contrary to law.

6th. Error of law occurring at the trial.

Ninth. The trial court erred in remarking in the presence of the jury that other indictments were then pending in said court against said defendant.

Tenth. The court erred in directing and ordering the official stenographer not to note the remarks of the court which defendant excepted to nor his exceptions.

Eleventh. There was error in the court overruling defendant's objection to certain testimony offered by the State and in rejecting certain proof offered by defendant, all of which defendant duly excepted to.

Twel-th. The trial court erred in overruling defendant's objection to and admitting Exhibits "A" and "C" on the part of the State as a standard of comparison of handwriting, because they were not admitted nor proven clearly to be in the handwriting of the defendant.

Thirteenth. There was error in the remarks of the prosecuting attorney in the presence of the trial jury excepted to by the
16 defendant, because they were false and irrelevant.

Fourteenth. The court erred in allowing the special private counsel for the State to make the closing argument on the part of the State to the jury instead of the regular prosecutor, the latter not being disabled in any way.

Fifteenth. That the circuit court erred in overruling plaintiff's in error petition in error for the reasons set forth herein and appearing upon the record of said cause.

Sixteenth. That there is no evidence proving the crime as charged.

Seventeenth. And for other errors appearing upon the face of the record and bill of exceptions in said cause that plaintiff in error cannot more specially assign, because he has never been allowed to see or make use of said bill of exceptions in any way whatever.

All of which more fully appears from his petition in error, hereto attached and made part hereof, and by the bill of exceptions and original papers filed herewith.

Respectfully submitted.

HIRAM P. McKNIGHT,
Plaintiff in Error.

In the Supreme Court of Ohio.

HIRAM P. McKNIGHT, Plaintiff in Error,
vs.
THE STATE OF OHIO, Defendant in Error. } Petition in Error.

The above-named Hiram P. McKnight, plaintiff in error, says:

That at the January term, A. D. 1892, of the court of common pleas in and for the county of Wood and State of Ohio, to wit, on the 8th day of March of said year, he was convicted of the crime of forgery and uttering forged instruments before the Hon.
17 A. B. Johnson, judge of said court, and a jury, and sentenced to the Ohio penitentiary for the term of seven years. He also

says that a motion for a new trial was made and filed in said court in said cause according to law and denied by said court.

He further alleges and says that a petition in error was filed in the circuit court of said county and proceedings in error were prosecuted therein in said cause, and thereupon the judgment and proceedings in said cause were affirmed and said proceedings in error were overruled.

Plaintiff in error complains that there is manifest error appearing upon the face of the record in said cause prejudicial to plaintiff in error and irregularities therein injurious to his rights.

There are errors and irregularities prejudicial to plaintiff in error appearing upon the face of the record of said cause as follows:

First. The trial court erred in overruling motion to quash the indictment.

Second. The court erred in overruling demurrer to the indictment.

Third. The trial court erred in placing plaintiff in error upon trial of said cause without counsel to assist him in his defense thereof, the court having personal knowledge of the fact that he was an indigent prisoner. See "Exhibit B," attached hereto and made part hereof.

Fourth. The court erred in placing the prisoner upon trial thereof (cause No. 1168) without first having assigned said cause for trial as provided by law.

Fifth. The court erred in overruling plaintiff's in error motion for a continuance the first time the case had been called for trial and without first being assigned for trial as provided by law, nor any notice whatever of a contemplated trial having been given to the prisoner and he being without counsel to prepare the
18 same for trial and the prisoner being confined in jail in custody of the sheriff.

Sixth. The court erred in refusing to give to the jury the requests of plaintiff in error, reduced to writing and filed therein, numbered "first," "second," "third," "fourth," "sixth," "seventh," "eighth," and "ninth."

Seventh. The court erred in its charge as given, lines 16, 17, 18, and 19 of folio 10 of record attached, which reads as follows: "The law as to a reasonable doubt is that the jury will be justified and are required to consider a reasonable doubt existing if the material facts, without which the guilt cannot be established, may be fairly reconciled with innocence," being clearly misleading.

Eighth. The court erred in its charge as given at folio "11," commencing at the 6th line and ending with the fourteenth, as being a wrong proposition of law, as assuming an intent without proof.

Ninth. It was error for the jury to return a verdict of guilty in said cause into court before the trial had closed and before the arguments of counsel.

Tenth. It was error for said court to overrule plaintiff's in error motion for a new trial upon each of the following grounds, viz:

First. That there was irregularity in the proceedings of the court.

Second. Erroneous rulings of the court during trial.

Third. Misconduct of prosecuting attorney.

Fourth. Surprise which the prisoner could not with ordinary prudence have guarded against.

Fifth. That the verdict is not sustained by evidence and is contrary to law.

Sixth. Error of law occurring at the trial.

19 Eleventh. The trial court erred in remarking in the presence of the trial jury that other indictments were then pending in said court against said defendant.

Twel-th. That said court erred in directing and ordering the official stenographer not to note the remarks of the court which the defendant excepted to.

Thirteenth. The trial court erred in overruling defendant's objections to the admission of certain testimony and evidence and in rejecting certain testimony and evidence offered by defendant, as shown by the bill of exceptions and record.

Fourteenth. That the trial court erred in overruling defendant's objection to and admitting Exhibits "A" and "C" on the part of the State as a standard of comparison of handwriting, because they were not admitted nor proven to be in the handwriting of the defendant.

Fifteenth. The court erred in allowing the prosecuting attorney to make improper remarks in presence of the jury, prejudicial to defendant, which were false and irrelevant.

Sixteenth. The court erred in allowing the special private counsel for the prosecution to make the closing argument to the jury instead of the prosecuting attorney, the latter not being disabled in any way.

Seventeenth. That the circuit court erred in overruling plaintiff's in error petition in error for the reasons set forth herein and appearing upon the record of said cause.

Eighteenth. And for other errors appearing upon the face of the bill of exceptions and record of said cause that plaintiff in error cannot more specially assign, because he has never been allowed to see or make use of said bill of exceptions in any way whatever.

All of said errors and irregularities, which more fully appear from the record of said cause attached hereto and made part hereof and marked "Exhibit A," and the remainder of said record, in-

20 cluding the bill of exceptions, in the custody of the clerk of said common pleas court of Wood county.

Wherefore the said Hiram P. McKnight, plaintiff in error herein, prays that the said judgment and proceedings of the said common pleas court of Wood county, Ohio, in said cause and the judgment of the circuit court of said county affirming the same be reversed and this plaintiff in error be restored to all that he may have lost by means thereof.

And your petitioner will ever pray.

HIRAM P. McKNIGHT,
Plaintiff in Error.

21 "EXHIBIT A."

Certified Copy of Final Record.

Final Record No. 27, page 203.

Court of Common Pleas, Wood County, Ohio.

THE STATE OF OHIO } *vs.* HIRAM P. MCKNIGHT. } No. 1168.

Pleas before the Hon. A. B. Johnson, one of the judges of the court of common pleas, at a term of said court continued and held within and for the county of Wood and State of Ohio on the 8th day of March, A. D. 1892.

Be it remembered that heretofore, to wit, on the 16th day of January, 1892, the following entry was made and entered on the journal of said court, to wit:

Journal 31, page 492.

In the Matter of the Grand Jury.

This day appeared at the bar of this court the grand jury heretofore impaneled and sworn in and for the body of this (Wood) county, to wit, 1, Aaron Barnd; 2, William Caris; 3, Alfred Davidson; 4, Frederick Neiman; 5, James J. Smith; 6, Robert Miller; 7, Fred. Hartman; 8, James Brandeberry; 9, Byron Frederick; 10, A. S. Nims; 11, Fred. Schwan; 12, William Klutz; 13, John J. Whitacre; 14, D. N. Easley; 15, Rollin B. Andrus, and presented their certain bills of indictment, each endorsed by Aaron Barnd, foreman of the grand jury, "A true bill," and against the following-named person, for the following specified offense, viz:

Indictment.

THE STATE OF OHIO, } *ss.:*
Wood County, }

In the court of common pleas, Wood county, Ohio, for the term of January, in the year of our Lord one thousand eight hundred and ninety-two.

The jurors of the grand jury of the State of Ohio within and for the body of the county of Wood, impaneled, sworn,
22 and charged to inquire of crimes and offenses committed within the said county of Wood, in the name and by the authority of the State of Ohio, on their oaths do find and present that Hiram P. McKnight, late of said county, on the 2nd day of June, in the year of our Lord one thousand eight hundred and ninety, in said county of Wood and State of Ohio, unlawfully did

falsely make, forge, and counterfeit a certain promissory note for the payment of money; which said false, forged, and counterfeited promissory note for the payment of money is of the purport and value following:

"$150.00. TOLEDO, OHIO, *June* 21*st*, 1880.

Three years after date, for value received, we, as principal debtors, promise to pay to James Hoagland or order one hundred and fifty dollars at Toledo, Ohio, and we hereby authorize any attorney of any court of record in the State of Ohio or elsewhere, at any time after the above sum becomes due, to appear for us or either of us in any court in said State of Ohio or elsewhere having jurisdiction of said sum and confess judgment hereon against us or either of us in favor of said payees or their assigns for said amount, with interest, at the rate of eight per cent. per annum, after maturity until paid, payable annually, the interest when due and unpaid to draw the same rate of interest as the principal, and costs of suit, and to release all errors in the entry and rendition of said judgment and all right and benefit of appeal and writs of error.

Witness our hands and seals this 21st day of June, 1880.

Due June 24th, 1893.

MARY HANNA. [SEAL.]
HENRY JONES, JR. [SEAL.]"

And upon the back of which said note is endorsed: Toledo, Dec. 12th, 1882. James Hoagland to H. P. McKnight. Paid on within note $50.00. Rec'd same Dec. 27th, 1882. H. P. McKnight.

with intent thereby to unlawfully defraud, contrary to the
23 form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

Second count. And the said jurors of the grand jury aforesaid within and for the body of the county of Wood and State of Ohio, impaneled, sworn, and charged to inquire of crimes and offenses committed within the said county of Wood, in the name and by the authority of the State of Ohio, upon their oaths do further find and present that said Hiram P. McKnight, on the 2nd day of June, in the year of our Lord one thousand eight hundred and ninety, in said county of Wood and State of Ohio, unlawfully did utter and publish as true and genuine a certain false, forged, and counterfeited promissory note for the payment of money; which said false, forged, and counterfeited promissory note for the payment of money is of the purport and value following:

"$150.00. TOLEDO, OHIO, *June* 21*st*, 1880.

Three years after date, for value received, we, as principal debtors, promise to pay to James Hoagland or order one hundred and fifty dollars at Toledo, Ohio, and we hereby authorize any attorney of any court of record in the State of Ohio or elsewhere, at any time after the above sum becomes due, to appear for us or either of us in any court in said State of Ohio or elsewhere having jurisdiction

of said sum and confess judgment hereon against us or either of us in favor of said payees or their assigns for said amount, with interest, at the rate of eight per cent. per annum, after maturity until paid, payable annually, the interest when due and unpaid to draw the same rate of interest as the principal, and costs of suit, and to release all errors in the entry and rendition of said judgment and all right and benefit of appeal and writs of error.

Witness our hands and seals this 21st day of June, 1880.

Due June 21th, 1883.

MARY HANNA. [SEAL.]
HENRY JONES, JR. [SEAL.]"

24 And upon the back of which said note is endorsed: Toledo, Dec. 12th, 1882. James Hoagland to H. P. McKnight. Paid on within note $50.00. Rec'd same Dec. 27, 1882. H. P. McKnight.

with intent thereby unlawfully to defraud, he, the said Hiram P. McKnight, then and there, at the time he so uttered and published said false, forged, and counterfeited promissory note for the payment of money, well knowing the same to be false, forged, and counterfeited, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

Third count. And the said jurors of the grand jury aforesaid within and for the body of the county of Wood and State of Ohio, impaneled, sworn, and charged to inquire of crimes committed within the said county of Wood, in the name and by the authority of the State of Ohio, upon their said oaths do further find and present that said Hiram P. McKnight, on the second day of June, in the year of our Lord one thousand eight hundred and ninety, in said county of Wood and State of Ohio, unlawfully did falsely make, forge, and counterfeit a certain promissory note for the payment of money; which said false, forged, and counterfeited promissory note for the payment of money is of the purport and value following:

$150.00. TOLEDO, OHIO, *June* 21*st*, 1880.

Three years after date, for value received, we, as principal debtors, promise to pay to James Hoagland or order one hundred and fifty dollars at Toledo, Ohio, and we hereby authorize any attorney of any court of record in the State of Ohio or elsewhere, at any time after the above sum becomes due, to appear for us or either of us in any court in said State of Ohio or elsewhere having jurisdiction of said sum and confess judgment hereon against us or either of us
in favor of said payees or their assigns for said amount, with
25 interest, at the rate of *of* eight per cent. per annum, after maturity until paid, payable annually, the interest when due and unpaid to draw the same rate of interest as the principal, and costs of suit, and to release all errors in the entry and rendition of

said judgment and all right and benefit of appeal and writs of error.

Witness our hands and seals this 21st day of June, 1880.

Due June 24th, 1883.

MARY HANNA. [SEAL.]
HENRY JONES, JR. [SEAL.]

with intent thereby to unlawfully defraud, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

Fourth count. And the said jurors of the grand jury aforesaid within and for the body of the county of Wood and State of Ohio, impaneled, sworn, and charged to inquire of crimes and offenses committed within the said county of Wood, in the name and by the authority of the State of Ohio, upon their said oaths do further find and present that said Hiram P. McKnight, on the second day of June, in the year of our Lord one thousand eight hundred and ninety, in said county of Wood and State of Ohio, unlawfully did utter and publish as true and genuine a certain false, forged, and counterfeited promissory note for the payment of money; which said false, forged, and counterfeited promissory note for the payment of money is of the purport and value following:

"$150.00. TOLEDO, OHIO, *June 21st*, 1880.

Three years after date, for value received, we, as principal debtors, promise to pay to James Hoagland or order one hundred and fifty dollars at Toledo, Ohio, and we hereby authorize any attorney of any court of record in the State of Ohio or elsewhere, at any time after the above sum becomes due, to appear for us or either of us in any court in said State of Ohio or elsewhere having jurisdiction of said sum and confess judgment hereon against us or
26 either of us in favor of said payees or their assigns for said amount, with interest, at the rate of eight per cent. per annum, after maturity until paid, payable annually, the interest when due and unpaid to draw the same rate of interest as the principal, and costs of suit, and to release all errors in the entry and rendition of said judgment and all right and benefit of appeal and writs of error.

Witness our hands and seals this 21st day of June, 1880.

Due June 24th, 1883.

MARY HANNA. [SEAL.]
HENRY JONES, JR. [SEAL.]"

with intent thereby to unlawfully defraud, he, the said Hiram P. McKnight then and there, at the time he so uttered and published said false, forged, and counterfeited promissory note for the payment of money, well knowing the same to be false, forged, and counterfeited, contrary to the form of the statute in such case made and provided and against the peace and dignity of the State of Ohio.

ANDREW J. MEARS,
Prosecuting Att'y of Wood County, Ohio.

"A true bill."

AARON BARND, *Foreman.*

And afterwards, to wit, on the 20th day of January, 1892, the defendant filed herein his motion to quash the third and fourth counts of said indictment, which is in the words and figures following, to wit:

Motion to Quash.

THE STATE OF OHIO } Indictment for Forgery and Uttering
vs. Forged Instruments.
HIRAM P. MCKNIGHT. }

And now comes the above-named Hiram P. McKnight and, before entering any plea whatever to said indictment, moves the court now here that the third and fourth counts of said indictment be quashed for the following reasons: 1st. That said third and fourth counts of said indictments are a repetition of the first and second counts thereof in substance, and for other reasons appearing
27 upon the face of said indictment and the record of said case in said court.

HIRAM P. MCKNIGHT.

And afterwards, on the same day, to wit, the 20th day of January, 1892, the following entry was made and entered upon the journal of said court, to wit:

Journal 31, page 518.

THE STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instruments.
HIRAM P. MCKNIGHT. }

In this case, it being the opinion of the court that public interest requires it, R. S. Parker is hereby appointed to assist the prosecuting attorney in the trial of the accused; and thereupon came R. S. Parker and accepted said appointment.

And afterward, on the same day, to wit, the 20th day of January, A. D. 1892, the following entry was made and entered upon the journal of said court, to wit:

Journal 31, page 518.

THE STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instruments.
HIRAM P. MCKNIGHT. }

This day came The State of Ohio, by A. J. Mears, prosecuting attorney, and R. S. Parker, heretofore appointed by the court to assist in the prosecution of this cause, also came the defendant in custody of the sheriff, and this cause was heard on the motion of the defendant to quash the third and fourth counts of the said indictment.

On consideration whereof the court do overrule said motion; to which ruling the defendant then and there excepted.

And thereupon was heard the demurrer of the defendant to the indictment, and upon consideration thereof the court do overrule the same; to which ruling the defendant then and there excepted.

Thereupon the defendant was arraigned, and the indictment was fully and distinctly read to him, and for his plea thereto saith he is not guilty and puts himself upon the country, and the prosecuting attorney on behalf of the State doth the like.

And afterwards, to wit, on the 7th day of March, A. D. 1892, the defendant filed herein a motion for continuance, which is in
28 the words and figures following, to wit:

Motion for Continuance.

THE STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instruments.
HIRAM P. MCKNIGHT. }

Motion for continuance.

And now comes the defendant above named, and upon the first time of calling said cause for trial the said defendant moves the court now here that said cause be continued until defendant can procure certain witnesses which are material to the defendant's said cause, which more fully appears by his affidavit filed herewith and made part of this motion.

(Signed) HIRAM P. MCKNIGHT, *Defendant.*

(Affidavit *off* file.)

And on the same day, to wit, the 7th day of March, A. D. 1892, the following entry was made and entered upon the journal of said court, to wit:

Journal 32, page 6.

THE STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instruments.
HIRAM P. MCKNIGHT. }

This day came The State of Ohio, by the prosecuting attorney of Wood county, Ohio, and R. S. Parker, an attorney heretofore appointed by the court to assist said prosecuting attorney in this cause; also came the defendant in charge of the sheriff of Wood county. Thereupon, the State having announced that it was ready for trial, the defendant filed a motion for continuance on the ground that certain of his witnesses were absent, and it appearing to the court that the defendant had made no effort to procure the attendance of such witnesses in this cause, said motion was overruled; to which ruling the defendant excepted. Thereupon a jury, to wit, William Lininger; 2, Carl Bachman; 3, Frank M. Cook; 4, George Jeffrey; 5, Frank Wollam; 6, William Stacy, Sr.; 7, Alva Hum; 8, John Mercer; 9, Garrett Teatsworth; 10, Jacob Vollmer; 11,

Jacob F. Huffman; 12, William Martin, was duly impaneled and sworn and the trial proceeded, but, the taking of testimony not being concluded, the further hearing of this cause is adjourned until tomorrow morning at 9 o'clock.

And afterwards, to wit, on the 8th day of March, A. D.
29 1892, the defendant filed herein a "charge requested by defendant," which is in the words and figures following, to wit:

Wood County, Common Pleas.

STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instruments. Case No. 1168.
HIRAM P. MCKNIGHT. }

Defendant's Requests to Charge.

The above-named defendant requests the said court to charge the jury on behalf of the defendant as follows:

First. The jury are instructed that in criminal trials the party accused is entitled to the benefit of the legal presumption in favor of innocence, which in doubtful cases is always sufficient to turn the scale in his favor. It is therefore a rule in criminal law that the guilt of the accused must be fully proved.

Second. The jury are instructed that if the evidence and testimony, taken as a whole and carefully weighed, is found to be susceptible of two interpretations, one that points to guilt and the other that points to innocence, the latter must prevail and the defendant is entitled to an acquittal.

Third. The jury are instructed that it is a settled maxim in criminal law that no one should be convicted unless the testimony taken together is not fairly consistent with any theory but guilt.

Fourth. The jury are instructed that it would be very unsafe to permit a conviction upon any proof upon which any theory can be reasonably based of innocence of the offense charged.

Fifth. Every one is presumed to be innocent until the contrary is proved, and no presumption can be made against the party charged with crime where, therefore, the defendant pleads not guilty. It is the duty of the prosecution to prove every fact essential to make out the guilt of the accused, and the facts proved must be inconsistent with the theory of his innocence or with any theory except that of guilty.

Sixth. If the defendant did not know at the time he took judgment on the note set forth in this indictment in this court,
30 on the — day of June, 1890, that it was a forged and false note, then you cannot convict him of uttering a forged instrument, no matter what was done with said judgment thereafter or what defendant might have said to the sheriff in regard thereto.

Seventh. Before you can convict the defendant of forgery the prosecution must prove to your satisfaction, beyond a reasonable doubt, that Hiram P. McKnight either falsely made the note set

forth in the indictment or procured some other person to make the same and forge it.

Eighth. The charges against the defendant may be proved by circumstancial evidence, but the circumstances must point to guilt alone and must be inconsistent with innocence. If they are consistent with both guilt and innocence it is your duty to acquit the defendant.

Ninth. Though standards of comparison may be used by experts called as witnesses upon the trial of an issue as to the genuineness of a signature, yet the standard of comparison, when a paper not already in the case or admitted to be genuine, must be clearly proved by persons who testify directly to its having been written by the party.

Charge of the Court.

And thereupon, on the same day, to wit, the 8th day of March, A. D. 1892, the court charged the jury as follows, to wit:

GENTLEMEN OF THE JURY: With the charge which the court will read to you there will be handed you a blank verdict. You will proceed to elect a foreman when you retire to your room and he will sign the verdict which you will agree upon. In case you find the defendant guilty of both the first and second counts charged in the indictment, no words need be inserted in the blank verdict, but your foreman will simply sign it.

In case you find him not guilty as to said first and second counts, then you will write "not" before the word "guilty" in each of the blank spaces, or in case you find him not guilty as to one
31 count and guilty as to the other, then you will write the word not before the word guilty in the finding on the count as to which you have so found him not guilty. The first and second counts in the indictment in this action are the counts as to which you will return your verdict.

The first count charges that the defendant, at the time and place named in the indictment, unlawfully did falsely make, forge, and counterfeit a certain promissory note with intent to defraud. A copy of said note is set out in said count. The second count charges that the defendant, at the time and place named in said count, unlawfully did utter and publish as true and genuine a certain false, forged, and counterfeited promissory note with intent to defraud. A copy of said note is given in said count.

The third and fourth counts in said indictment you need not consider.

The section of the statute under which this indictment has been drawn reads as follows:

"SEC. 7091. Forging or altering note, bond, lease, will, bank bill or note, etc.; uttering or publishing same; whoever falsely makes, alters, forges, counterfeits, prints, or photographs, any record, or other authentic matter of a public nature, or any license or certificate authorized by the laws of this State, or any charter, letters patent, deed, lease, writing obligatory, will, testament, annuity,

bond, covenant, bank bill or note, check, bill of exchange, contract or promissory note for the payment of money or other property or any acceptance of a bill of exchange or the number or any principal sum of any accountable receipt for any note, or any order, warrant, or request for the payment of money, or the delivery of goods, or chattels of any kind, or any acquittance or receipt either for money or goods, or any acquittance, release or discharge of any debt, account, action, suit, demand or other for or assurance of money, stock, goods, chattels, or other property whatever, or any letter of an attorney, or any power to receive money, or to
32 receive and transfer stock or annuities, or let, dispose of, alien, or convey, any goods or chattels, lands or tenements, or other estate, real or personal, or any bill, order, or warrant drawn by any auditor for the payment of money at any public treasury with intent to defraud; or utters or publishes as true and genuine any such false, altered, forged, counterfeited, falsely printed or photographed matter, knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to defraud, is guilty of forgery."

To this indictment Hiram P. McKnight has plead not guilty. The plea of not guilty puts in issue every material averment of the indictment, and it is for the State to satisfy your minds beyond a reasonable doubt of the truth of such material averments. In law the defendant is innocent until he is proved guilty beyond a reasonable doubt. The law as to a reasonable doubt is that the jury will be justified and are required to consider a reasonable doubt existing if the material facts, without which the guilt cannot be established, may be fairly reconciled with innocence.

In human affairs absolute certainty is not always attainable. From the nature of things, reasonable certainty is all that can be attained on many subjects. When a full and candid consideration of the evidence produces a conviction of guilt and satisfies the mind to a reasonable certainty, mere capricious or ingenious artificial doubt is of no avail. As to the expert evidence—that is, the testimony of witnesses who from the nature of their business occupations are qualified to testify as to the handwriting that may be in question—such testimony is competent and is to be considered by you where such persons give their testimony after having compared the handwriting that is in question with other handwriting of the defendant. The handwriting with which the comparison is made must be shown to be the handwriting of the defendant in
33 case the same is not admitted to be his.

As to the first count in the indictment, if you find from the evidence beyond a reasonable doubt that the defendant either by himself wrote the said note set out in said first count with intent thereby to unlawfully defraud, or if you find that he procured another to write it, then in law he has falsely made, forged, and counterfeited said note with such intent. As to the second count in the indictment, that the defendant uttered and published as true and genuine the said note set out in said indictment with intent to defraud—if you find from the evidence beyond a reasonable doubt

that the defendant, Hiram P. McKnight, procured and obtained a judgment on the said note in the court of common pleas of Wood county, Ohio, and at the time he so procured said judgment he knew that the note on which he procured the same was false and forged—then in law he has uttered and published as true and genuine said note with intent to defraud. Subject to the above rules, you will carefully consider all the evidence in this case.

If the State has failed to satisfy you beyond a reasonable doubt that the defendant, Hiram P. McKnight, did falsely make, forge, and counterfeit said promissory note, as charged in the first count in the indictment, then your verdict should be not guilty as to said first count; but if, on the other hand, the State has satisfied you beyond a reasonable doubt that the defendant, Hiram P. McKnight, did falsely make, forge, and counterfeit said promissory note as charged in said count, then your verdict as to said first count should be "guilty." If the State has failed to satisfy you beyond a reasonable doubt that the defendant, Hiram P. McKnight, did unlawfully utter and publish as true and genuine said promissory note, as charged in said second count, then your verdict as to said second count should be not guilty; but if, on the other hand, the State has satisfied you beyond a reasonable doubt that the defendant, Hiram P. McKnight, unlawfully did utter and publish as true and
34 genuine said promissory note, as charged in said second count, then your verdict as to said second count should be "guilty."

To which charge defendant excepts; also to refusal to charge defendant's requests.

And thereupon, on the same day, to wit, the 8 day of March, A. D. 1892, the said jury returned their verdict in the words and figures following, to wit:

Verdict.

In the Court of Common Pleas of Wood County, Ohio, January Term, 1892.

THE STATE OF OHIO *vs.* HIRAM P. McKNIGHT. } No. 1168. Indictment for Forgery and Uttering Forged Instrument.

We, the jury in this case, find the defendant, Hiram P. McKnight, guilty in manner and form as he stands charged in the first count of the indictment, and we do find him guilty in manner and form as he stands charged in the second count of the indictment.

JOHN MERCER, *Foreman.*

And thereafter, on the same day, the following entry was made and entered upon the journal of said court, to wit:

Journal 32, page 10.

THE STATE OF OHIO } Indictment for Forgery and Uttering
vs. Forged Instruments.
HIRAM P. MCKNIGHT. }

This day again came The State of Ohio, by its said attorneys, and the defendant in charge of said sheriff, and also came said jury, and the trial was resumed, and after having heard all the testimony, the argument of counsel, and the charge of the court, and the State having elected to submit this cause to the jury upon the first and second counts only of said indictment, said jury retired to deliberate and afterwards came into court with their verdict in the words and figures following and signed by their foreman, to wit:

We, the jury in this case, find the defendant, Hiram P. McKnight, guilty in manner and form as he stands charged in the first count of the indictment, and we do find him guilty in manner and form as he stands charged in the second count of the indictment.

JOHN MERCER, *Foreman.*

Thereupon the defendant gave notice of his intention to
35 file a motion for a new trial of said cause.

And afterwards, to wit, on the 10th day of March, A. D. 1892, a motion for a new trial was filed herein, which is in the words and figures following, to wit:

Motion for New Trial.

In the Court of Common Pleas in and for Wood County, Ohio.

STATE OF OHIO } Indictment for Forgery and Uttering a
vs. Forged Instrument. Case No. 1168.
HIRAM P. MCKNIGHT. }

Motion for new trial.

And now comes the above-named defendant and moves the court now here that the verdict of the jury in the above-entitled cause finding defendant guilty as charged in the first and second counts of said indictment be set aside and a new trial granted for the following reasons and upon the following grounds, to wit:

First. That there is irregularity in the proceedings of the court.

Second. That there was several orders of the court during the trial of said cause by which the defendant was prevented from having a fair trial.

Third. For misconduct of the prosecuting attorney.

Fourth. Surprise which defendant could not with ordinary prudence have guarded against.

Fifth. That the verdict is not sustained by sufficient evidence and is contrary to law.

Sixth. Error of law occurring at the trial.

H. P. McKNIGHT, *Defendant.*

Affidavits of F. A. Baldwin and H. P. McKnight are hereto attached and made part of this motion:

Affidavit of Baldwin.

STATE OF OHIO, } ss:
Wood County, }

Frank A. Baldwin, *who* being first duly sworn according to law, says that he is an attorney-at-law in said county and State, and was during the January, 1892, term of the court of common pleas of said county employed as the attorney for Hiram P. McKnight in certain criminal causes then pending in said court against said Hiram P. McKnight and known as criminal causes Nos. 1080, 1081,
36 1082, 1083, and 1084 respectively.

That other criminal causes were also at the same time pending in said court against said Hiram P. McKnight, in which affiant was not employed as attorney for said Hiram P. McKnight, which are known respectively as criminal causes docket Nos. 1165, 1166, 1167, 1168, 1169, 1170, and 1171; that during the month of February, 1892, said court assigned said first causes for trial on March 7; that on the — day of February, 1892, the prosecuting attorney filed his precipes for subpœnas for the witnesses for the State in cases 1083, 1167, and 1170 and in no other cases pending against said Hiram P. McKnight as aforesaid, to the knowledge of affiant; that said Hiram P. McKnight was then held confined in the jail of said county upon said charges.

That affiant, on the 29th day of February, A. D. 1892, prepared a written statement from the records of said court setting forth at large the names of each and every witness subpœnaed by the State in any of said causes heretofore enumerated, giving the numbers of each of said cases in which the State had so ordered their witnesses for the trial thereof; said statement is hereto attached and marked Exhibit "A" and made part hereof; that affiant prepared said statement expressly for said Hiram P. McKnight and delivered the same to him on or about the 1st day of March, 1892, for the express purpose to apprise the said McKnight of the cases the prosecuting attorney had prepared to try, so that defendant could secure his witnesses for the trial of the same cases; that at the same time the prosecuting attorney had only subpœnaed witnesses in cases Nos. 1083, 1167, and 1170.

F. A. BALDWIN.

Subscribed and sworn to before me this 15th day of March, 1892.

A. L. MUIR, *Clerk.*

EXHIBIT "A."

OHIO)
vs.) No. 1083.
McKNIGHT.)

Witnesses for the State: E. C. Rudolph, Jerome Storner,
37 S. N. Sawyer, M. H. Armitage, F. H. Hale, Albert H. Surer, Nelson G. Harpel, Charles H. Smith, Henry B. Warner, Alice Warner, Catherine Grames, G. A. Grames, H. A. Biossat, J. V. Beverstock, E. L. Schomberg, Fred. E. Hay, Richard Biggs, Charles Prue, N. Hadnett, J. P. Delphy, T. Adams Black, and J. H. Southard; in No. 1167, Mary Hanna, E. C. Calkins, James Hoagland, Henry Jones, Jr., Allen S. Ferguson, R. S. Parker, R. B. Moore, J. B. Wilson, D. T. order book, Frank Dunn, Cyrus Lenhart, W. R. Noyes; in No. 1170, John W. Allen, E. C. Calkins, Harriet Allen, Henry James, William Nichols, Harriet Wagner, James O. Troup, Silas Nugent, John B. Wilson, D. T. order book, W. R. Noyes, Cyrus W. Lenhart.

Affidavit of McKnight.

STATE OF OHIO,)
Wood County,) *ss:*

Hiram P. McKnight, *who* being first duly sworn according to law, says that during the January term, 1892, of the court of common pleas in and for said county there were pending against affiant in said court several indictments and more particularly known as criminal causes docket Nos. 1080, 1081, 1082, 1083, 1084, 1165, 1166, 1167, 1168, 1169, 1170, and 1171; that during said term the said court assigned some of said causes for trial, to commence on the 7th day of March, 1892; that on the 29th day of February, 1892, the prosecuting attorney filed his precipes in the clerk's office for subpœnas for the witnesses for the State in cases Nos. 1083, 1167, and 1170.

Affiant also says that he was furnished the intelligence from the prosecutor himself that No. 1083 would be first brought to trial; that on March 7th affiant was not prepared to proceed to the trial of No. 1168, and, notwithstanding, as then unprepared, he was forced into the trial of said cause No. 1168; that affiant, who was defendant therein, was greatly surprised and had no possible chance for a fair trial thereon; that the same was not brought about by any act or negligence on the part of this affiant and could not have been guarded against by ordinary care on part of affiant; that affiant was on said 7th day of March ready and prepared to proceed to the trial of causes Nos. 1080, 1081, 1082, 1083, 1084, and 1167 and 1170 and had had his witnesses subpœnaed in said causes.

38 HIRAM P. McKNIGHT.

Subscribed and sworn to before me this 15th day of March, A. D. 1892.

A. R. HARRISON,
Deputy Clerk.

And afterwards, to wit, on the 15th day of March, 1892, the following entry was made and entered on the journal of said court, to wit:

Journal 32, page 21.

THE STATE OF OHIO *vs.* HIRAM P. McKNIGHT. } Indictment for Forgery and Uttering Forged Instrument.

This day again came said defendant, in charge of said sheriff, and The State of Ohio, by its said attorneys, and thereupon was heard the motion of the defendant for a new trial of this cause; upon consideration whereof the court do overrule said motion; to which ruling the defendant excepted.

And the defendant, on being inquired of by the court, having nothing to say why the sentence of the court should not be pronounced against him, and it appearing to the court that the crimes charged in the first and second counts of said indictment were but a single transaction, and that but one penalty therefor should be imposed—

It is therefore considered and adjudged that said defendant, Hiram P. McKnight, shall be imprisoned in the Ohio penitentiary, at Columbus, Ohio, for a period and term of seven years, and that he shall pay the costs of this prosecution, taxed at $——.

And on the same day the following entry was made and entered on the journal of said court, to wit:

Journal 32, page 22.

THE STATE OF OHIO *vs.* HIRAM P. McKNIGHT. } Indictment for Forgery and Uttering Forged Instrument.

It is hereby ordered by the court that R. S. Parker be, and he is, allowed as a reasonable compensation for his services as an
39 attorney in assisting the prosecution in this cause the sum of fifty dollars as his fee therefor.

And afterwards, to wit, on the 29th day of March, 1892, the following entry was made and entered on the journal of said court, to wit:

Journal 32, page 32.

THE STATE OF OHIO } Indictment for Forgery and Uttering Forged
vs. Instrument.
HIRAM P. MCKNIGHT. }

This day came the said defendant and presented his bill of exceptions taken on the trial of this case, and, the court finding the same correct, it is ordered that the same be and it hereby is allowed and ordered made part of the record herein.

And afterwards the following proceedings were had in the circuit court of Wood county, Ohio, to wit:

On the 29th day of March, 1892, a petition in error was filed herein, which is in the words and figures following, to wit:

In the Circuit Court in and for the County of Wood, Ohio.

HIRAM P. MCKNIGHT }
vs. Petition in Error.
THE STATE OF OHIO. }

The above-named Hiram P. McKnight, plaintiff in error, says—

That on the 7th day of March, A. D. 1892, in the common pleas court in and for the county of Wood and State of Ohio, he was convicted upon an indictment charging him with having committed the crime of forgery and uttering a forged instrument, and said cause was more particularly known as cause No. 1168 of the criminal docket of said court.

That said conviction ought not to stand and should be set aside and vacated for numerous errors prejudicial to this plaintiff in error appearing in the proceedings upon the trial of said cause, and all of which more fully appears upon the face of the record of said cause, which is filed herewith; that said conviction and the proceedings had upon the trial of said cause were erroneous and prejudicial to this plaintiff in error, in this:

First. Said court erred in overruling defendant's motion
40 to quash said indictment.

Second. That said court erred in overruling plea in abatement to said indictment.

Third. That said court erred in overruling the demurrer to said indictment.

Fourth. That said court erred in overruling plaintiff's in error motion for a continuance of said cause.

Fifth. That said court erred in remarking in the presence of the trial jury that other indictments were then pending in said court—other indictments against this defendant.

Sixth. That said court erred in directing and ordering the official stenographer not to note the remarks of the court which the defendant excepted to.

Seventh. That said court erred in admitting sundry evidence which defendant objected to and excepted to.

Eighth. That the court erred in admitting Exhibits "A" and "C" on the part of the State, because they were not admitted nor proven to be in the handwriting of the defendant.

Ninth. That the court erred in rejecting sundry evidence offered by defendant.

Tenth. The court erred in its charge to the jury as given.

Eleventh. The court erred in not giving defendant's requests to charge the jury numbers —.

Twelfth. There was error in the remarks of the prosecuting attorneys in the presence of the jury, as excepted to by defendant.

Thirteenth. The court erred in allowing the attorney assisting the prosecuting attorney in the trial of said cause to make the closing argument to the jury and not compelling the prosecuting attorney to make the closing argument to the jury.

Fourteenth. And for other errors which are manifestly prejudicial to this plaintiff in error, all which appear upon the face of
41 the record of this case.

Fifteenth. The court erred in overruling the motion for a new triad.

Wherefore plaintiff in error prays that the said judgment and conviction may be reversed, and that he may be restored to all things he has lost by reason thereof.

H. P. McKNIGHT, *Pro. Per., and*
BALDWIN & HARRINGTON,
For Plaintiff in Error.

And on said petition in error the following waiver was endorsed and filed here, to wit:

I do hereby waive the issuing and service of summons in error in this action and enter the appearance of said defendant in error thereto this 29th day of March, A. D. 1892.

ANDREW J. MEARS,
Prosecuting Attorney.

And afterwards, to wit, on the 30th day of April, A. D. 1892, the following entry was made and entered upon the journal of said circuit court, to wit:

Journal 1, page 431.

HIRAM P. McKNIGHT)
vs.) Error.
THE STATE OF OHIO.)

The said parties appeared by their attorneys and this cause came on to be heard upon the petition in error of the said Hiram P. McKnight, plaintiff in error herein, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the court of common pleas of Wood county, Ohio, filed therewith in said cause and prosecution of The State of Ohio *vs.* Hiram P. McKnight, defendant, mentioned and referred to in said

petition in error, and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of the record in said orders and judgment of said court of common pleas. It is thereupon considered, ordered, and adjudged by this court that the judgment and proceedings of the said court of common pleas in said cause and prosecution in favor of said
42 defendant in error and against said plaintiff in error be, and the same are hereby, in all things affirmed.

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at 8—, and in default thereof that execution issue therefor.

It is ordered that a special mandate be sent to the court of common pleas of Wood county to carry this judgment into execution. (Mandate certified.)

And afterwards, to wit, on the 18th day of June, A. D. 1892, the following entry was made and entered upon the journal of said circuit court, to wit:

Journal 1, page 435.

In Circuit Court of Wood County, Ohio.

HIRAM P. McKNIGHT }
vs.
THE STATE OF OHIO. }

Wood county to R. S. Parker, debtor.

1892. April term. To services as assistant of prosecuting attorney in above case..... $25 00

Approved June 4th, 1892.

C. H. SCRIBNER,
Presiding Judge.

THE STATE OF OHIO, }
Wood County, } *ss:*

I, A. L. Muir, clerk of court of common pleas within and for said county and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that *that* the foregoing is taken and copied from the final record of the proceedings in the case number 1168, The State of Ohio *vs.* Hiram P. McKnight, in the several courts within and for said county, and that said foregoing copy has been compared by me with the original record, and that the same is a correct transcript thereof.

In testimony whereof I do hereby subscribe my name officially and affix the seal of said court, at the court-house,
The Cou- —. in Bowling Green, in said county, this 15th day of July, A. D. 1892.

A. L. MUIR, *Clerk,*
By ALF. B. FARMER, *Deputy.*

43 "EXHIBIT B."

STATE OF OHIO, } ss.
Wood County, }

F. A. Baldwin, being first duly sworn according to law, says that he is an attorney-at-law and a regular practitioner as such in the courts of Ohio; that at the January term, 1892, of the court of common pleas of Wood county, Ohio, he was attorney for Hiram P. McKnight in an action in attachment wherein said Hiram P. McKnight was defendant, and certain monies were in said action garnisheed as the property of said Hiram P. McKnight, the same not exceeding three hundred dollars ($300.00), and the same was attached and held in said court by virtue of said writ

That affiant, as such attorney, filed in said court a motion on behalf of said Hiram P. McKnight. A copy of said motion is hereto attached and made part hereof and marked "Exhibit A." That said motion came up for hearing before said court (Hon. A. B. Johnson, judge thereof, presiding) on the 13th day of January, 1892, and upon said hearing, to affiant's best recollection, there was no testimony, evidence, or proof offered either *pro* or *con.*, except the testimony of said Hiram P. McKnight, who testified substantially that he was a married man, living in the State of Ohio with his wife and infant daughter, and that he was the sole head and support of his said family; that the said monies that was then held by virtue of said writ of attachment and garnishment was his own property, and that he had no other property or money of any kind whatsoever, and that neither his said wife or himself was possessed of a homestead or property of any description, and asked that said money be set aside in lieu of a homestead.

That said motion was denied by said judge and overruled; all of which more fully appears from a copy of the journal entry made in said cause and attached hereto and marked "Exhibit B."

44 F. A. BALDWIN.

Subscribed and sworn to before me this 26th day of September, A. D. 1893.

A. L. MUIR,
Clerk of Common Pleas Court.

45 EXHIBIT "A."

In the Court of Common Pleas of Wood County, Ohio.

THE WAYNE BUILDING, LOAN & ACCUMULATING FUND ASSOCIATION
vs.
HIRAM P. MCKNIGHT.

Motion.

Now comes the defendant, Hiram P. McKnight, and moves the court to discharge the attachment heretofore granted herein and to

release the property heretofore attached by garnishee process herein for the reason that the property thus attached is exempt from execution and attachment under the laws of Ohio.

HIRAM P. McKNIGHT,
By BALDWIN & HARRINGTON,
His Att'ys.

46 EXHIBIT "B."

(*Extract from Final Record* 31, *p.* 87.)

THE WAYNE BUILDING, LOAN & ACCUMULATING FUND ASSOCIATION OF PALMYRA, NEW YORK, *vs.* HIRAM P. McKNIGHT. } Civil Action.

JANUARY 13, 1892.

"This day came said parties, with their attorneys, and this cause was submitted to the court and a jury, to wit:"

(Here follows entry of trial and verdict and judgment, and the entry concludes as follows:)

"Thereupon was heard the motion of the defendant to discharge the attachment and garnishee under which the funds in the hands of the Merchants' National Bank of Toledo, Ohio, are held, and, after hearing the evidence and the arguments of counsel, the court took the same under consideration and reserved his decision for a future day."

And on March 11th, 1892, the following entry was made:

THE WAYNE B., L. & A. F. ASSOCIATION, &c., *vs.* HIRAM P. McKNIGHT. } Civil Action.

"Upon due consideration, the motion of the defendant to discharge the attachment and garnishment under which the funds of the defendant in the hands of the Merchants' National Bank of Toledo, Ohio, are held is overruled; and it is ordered that said garnishee pay to the clerk of this court, to apply on the judgment herein, the sum of $115.74, the said funds of defendant in its hands, as shown by the answer of said garnishee herein."

47 The following appeared in the "Wood County Tribune" of issue of March 17, 1892:

Seven years.

The time fixed by his Honor Judge Johnson

That H. P. McKnight must serve in the Ohio penitentiary.

Quite a number of visited the court-room Tuesday night, aside from attorneys and court attachees, to hear the sentence, to be pronounced upon H. P. McKnight by Judge Johnson, in accordance

with the verdict of the jury returned at the last term of common pleas. After the disposition of a few minor cases the judge requested McKnight to stand up and receive the decision of the court. The judge stated that he had received an anonymous letter containing threats in reference to the case, but this had not in any manner influenced him, as his mind was fully made up before this was received. He addressed the prisoner about as follows: You appear to be a man who thinks the world owes you a living, which you seem determined to secure by foul means if not by fair. You at no time have asserted your innocence of the charges against you, but have depended upon your superior ability as a trickster and sharper to outwit your fellows. You appear to be a man without integrity or a sense of what is right and proper. I have but little hope that a term of imprisonment will result in your moral improvement. I rather impose this sentence upon you that you may not be permitted to continue your impositions upon the public. During the entire ordeal of the trial the prisoner has maintained a stolid indifference and at all times appeared unmoved. The court fixed the time of imprisonment for the last count at seven years, which with the two years remaining of the first sentence makes a total of nine years.

It is thought that McKnight will again have his case up before the circuit court that convenes here in April, when the proceedings will again be gone through with. It is doubtful if in the
48 history of the State a more peculiar case in all respects ever came up before the courts.

49 STATE OF OHIO, } *ss.:*
City of Columbus, }

I, Josiah B. Allen, clerk of the supreme court of the State of Ohio, do hereby certify that the foregoing is a true copy of the docket and journal entries and the record in the case of Hiram P. McKnight against The State of Ohio, heard upon motion, No. 2002, for leave to file petition in error to the circuit court of Wood county.

Seal of the Supreme Court of the State of Ohio.

In witness whereof I have hereunto subscribed my name and affixed the seal of said court this 20th day of July, A. D. 1894.

JOSIAH B. ALLEN, *Clerk.*
By GEO. H. KOLKER, *Deputy.*

Fees for this, $15.00.
Paid by H. P. McKnight.

50 "EXHIBIT B."

Certified Copy of Journal Entry.

THE STATE OF OHIO, } ss:
Wood County, }

In Common Pleas Court, January (March 15th) Term, 1892.

THE STATE OF OHIO, Plaintiff, *vs.* HIRAM P. McKNIGHT, Defendant. } Journal, Vol. 32, Page 21. Certified Copy of Journal Entry.

THE STATE OF OHIO *vs.* HIRAM P. McKNIGHT. } No. 1168. Indictment for Forgery and Uttering Forged Instrument.

This day again came said defendant, in charge of said sheriff, and The State of Ohio, by its said attorneys, and thereupon was heard the motion of the defendant for a new trial of this cause; upon consideration whereof the court do overrule said motion; to which ruling the defendant excepted.

And the defendant, on being inquired of by the court, having nothing to say why the sentence of the court should not be pronounced against him, and it appearing to the court that the crimes charged in the first and second counts of said indictment were but a single transaction, and that but one penalty therefor should be imposed, it is therefore considered and adjudged that said defendant, Hiram P. McKnight, shall be imprisoned in the Ohio penitentiary at Columbus, Ohio, for a period and term of seven years, and that he shall pay the costs of this prosecution, taxed at $—.

Fees for this, 75c., paid by H. P. McKnight.

51 [Endorsed:] Journal No. 32, page 21. Common pleas court, Wood county, Ohio. Certified copy of journal entry. The State of Ohio, plaintiff, *vs.* Hiram P. McKnight, defendant.

THE STATE OF OHIO, } ss:
Wood County, }

I, A. L. Muir, clerk of the common pleas court within and for said county, and in whose custody the files, journals, and records of said court are required by the laws of the State of Ohio to be kept, hereby certify that the foregoing is taken and copied from the journal of the proceedings of the said court within and for said county, and that said foregoing copy has been compared by me with the original entry on said journal, and that the same is a correct transcript thereof.

Seal Common Pleas Court of the County of Wood, Ohio.

In testimony whereof I do hereby subscribe my name officially and affix the seal of said court, at the court-house, in Bowling Green, in said county, this 4th day of August, A. D. 1894.

A. L. MUHR, *Clerk*,
By —— ——, *Deputy*.

52 "EXHIBIT C."

"*Certificate of Sentence.*

"At a term of the court of common pleas begun and held, at the court-house, in Bowling Green, within and for the county of Wood and State of Ohio, on the 14th day of January, A. D. 1892—present, the Hon. Artemus B. Johnson, judge—in the record and proceedings of said court then and there had, among other things, is the following judgment and sentence, to wit:

"THE STATE OF OHIO } Indictment for Forgery and Uttering
vs. Forged Instrument.
HIRAM P. MCKNIGHT. }

"The said Hiram P. McKnight having been found guilty of forgery and uttering forged instrument, it is therefore the sentence of the court that he be imprisoned in the penitentiary of this State and kept at hard labor (no part of said time to be kept in solitary confinement) for the term of seven years, and that he pay the costs of this prosecution, taxed at two hundred thirty and thirty-two hundredths dollars.

"In witness whereof I hereunto set my hand and affix the seal of said court, at Bowling Green, this 16th day of March, A. D. 1892.

"A. L. MUHR, *Clerk*,
[SEAL.] "By A. R. HARRISON,
"*Deputy Clerk.*"

53 [Endorsed:] Filed in circuit court Sep. 19, 1894. Chas. F. Galloway, clerk; Jos. W. Wickham, deputy.

54 *Transcript of Journal Entries to Supreme Court.*

(Revised Statutes, secs. 6716, 6718.)

THE STATE OF OHIO, } ss:
Franklin County, }

In the Circuit Court.

THE STATE OF OHIO *ex Rel.* HIRAM P. MCKNIGHT, Plaintiff, }
vs.
CHARLES C. JAMES, Warden Ohio Penitentiary, Defendant. }

I, Charles F. Galloway, clerk of the circuit court within and for the county of Franklin, do hereby certify that the following entries

and judgments are truly copied from the journals of said court, to wit:

1894, Aug. 24th.—Affidavit & prec. filed.
" " " *Habeas corpus* allowed, ret. Aug. 31st, 1894, at 10 o'clock a. m.; writ of *habeas corpus* issued to sh'ff of Franklin Co., Ohio, ret. as above.
" " 31st.—Reply filed.
" Sept. 1st.—Relator remanded into custody of warden and pay costs of proceedings. 3, 513.
" " 19th.—Bill of exceptions filed.

55 In Vacation, after January Term, 1894.

THE STATE OF OHIO *ex Rel.* HIRAM P. MCKNIGHT
vs.
C. C. JAMES, Warden, &c.
} Relator Remanded into Custody of Warden and Pay Costs of Proceedings.

This day came the defendant, Charles C. James, warden of the Ohio penitentiary, and made return of the writ of *habeas corpus* heretofore issued in this case, and also brought the body of the said Hiram P. McKnight, petitioner herein; thereupon the petitioner, McKnight, filed his reply to the return of the warden; thereupon the case was heard upon the pleadings and testimony by the Honorable Gilbert H. Stewart, sitting in chambers. On consideration whereof, the said judge finds that the said Hiram P. McKnight is lawfully imprisoned by said Charles C. James as warden of the Ohio penitentiary.

It is therefore ordered that the said Hiram P. McKnight be remanded to the custody of the said Charles C. James as warden of the Ohio penitentiary, and that the said McKnight pay the costs of this proceeding, taxed to $8—. To all of which the said Hiram P. McKnight excepted.

Sept. 1st, 1894.

56 Circuit Court of Franklin County, Ohio.

THE STATE OF OHIO *ex Rel.* HIRAM P. MCKNIGHT
vs.
CHARLES C. JAMES, Warden Ohio Penitentiary.
} Petition for a Writ of *Habeas Corpus.*

The above-named Hiram P. McKnight, relator herein, alleges and says—

That he is a citizen of the United States and of the State of Ohio.

That he is unlawfully deprived of his liberty in the Ohio penitentiary, at the city of Columbus, by Charles C. James, warden thereof and an officer of the State of Ohio.

That said imprisonment is in violation of the Constitution and laws of the United States.

That said imprisonment is by virtue only of a pretended warrant of commitment, of which the following is a copy:

"*Certificate of Sentence.*

"At a term of the court of common pleas beginning and held at the court-house, in Bowling Green, within and for the county of Wood and State of Ohio, on the 14th day of January, A. D. 1892—present, the Hon. Artemus B. Johnson, judge—in the records and proceedings of said court then and there had, among other things, is the following judgment and sentence, to wit:

57 "THE STATE OF OHIO } Indictment for Forgery and
vs. Uttering Forged Instrument.
HIRAM P. McKNIGHT. }

"The said Hiram P. McKnight having been found guilty of forgery and uttering forged instrument, it is therefore the sentence of the court that he be imprisoned in the penitentiary of this State and kept at hard labor (no part of said time to be kept in solitary confinement) for the term of seven years, and that he pay the costs of prosecution, taxed at two hundred and thirty and thirty-two hundredths dollars.

"In witness whereof I hereunto set my hand and affix the seal of said court, at Bowling Green, this 16th day of March, A. D. 1892.

"A. I. MUIR, *Clerk*,
"By A. R. HARRISON,
Deputy Clerk."

Relator and petitioner also alleges that there is no judgment or sentence of any court whatever authorizing said pretended warrant of commitment; that the same is a false, forged, and counterfeit certificate of judgment and sentence that never existed, and the same is therefore void and said imprisonment is without any legal authority and without due process of law. Wherefore the said Hiram P. McKnight prays that a writ of *habeas corpus* may issue in his behalf; said imprisonment be inquired into and the
58 cause thereof be made known; that the same be declared null and void; that said warden show cause at large why he hold- relator a prisoner, and the same be declared void, and that relator be discharged from said imprisonment and restored to his liberty; and relator will ever pray.

HIRAM P. McKNIGHT.

THE STATE OF OHIO, } ss:
Franklin County, }

Hiram P. McKnight, *who* being first duly sworn, says that he is the petitioner in the foregoing petition and the facts set forth therein are true.

HIRAM P. McKNIGHT.

Subscribed and sworn to before me this 22d day of August, A. D. 1894.

F. SIEGEL,
Notary Public, Franklin County, Ohio. [SEAL.]

To clerk of circuit court:

Upon the application of Hiram P. McKnight, duly made, a writ of *habeas corpus* is granted, as prayed for in the foregoing petition, for the production of the body of Hiram P. McKnight before me at the circuit court room, in the court-house, in Columbus, Ohio, returnable on the 31st day of August, 1894, at 10 o'clock a. m.

GILBERT H. STEWART,
Judge of the Circuit Court, Second Circuit.

Aug. 24, 1894.

59 [Endorsed:] Franklin Co. circuit court. Ohio *ex rel.* McKnight *vs.* Charles C. James, warden. Petition. No. 983. Filed Aug. 24, 1894. Chas. F. Galloway, clerk, by Jas. S. Walters, dep'ty. (L.)

60 In the Matter of the Application for a Writ of *Habeas Corpus* by HIRAM P. MCKNIGHT.

Return of C. C. James, Warden of the Penitentiary, to the Hon. Gilbert H. Steward, Circuit Judge for the Second Circuit of Ohio.

The undersigned, Charles C. James, warden of the penitentiary of the State of Ohio, hereby returns the attached writ of *habeas corpus*, issued on the relation of Hiram P. McKnight, and respectfully states that he has the said Hiram P. McKnight in his custody; that he has had the said Hiram P. McKnight in his custody since about March 18, 1892, at which time said McKnight was delivered into his custody by the sheriff of Wood county, in the State of Ohio, together with a copy of the sentence of the court of common pleas of Wood county, Ohio, which reads as follows:

Certificate of Sentence.

At a term of the court of common pleas begun and held at the court-house in Bowling Green, within and for the county of Wood and State of Ohio, on the 4th day of January, A. D. 1892—present, the Honorable Artemas B. Johnson, judge—in the record and proceedings of said court then and there had, among other things, *in* the following judgment and sentence, to wit:

61 THE STATE OF OHIO } Indicted for Forgery and Uttering
vs. } Forged Instrument.
HIRAM P. MCKNIGHT. }

The said Hiram P. McKnight having been found guilty — forgery and uttering forged instrument, it is therefore the sentence of the court that he be imprisoned in the penitentiary of this State and

kept at hard labor (no part of said time to be kept in solitary confinement) for the term of seven years, and that he pay the costs of this prosecution, taxed at $23.34.

In witness whereof I hereunto set my hand and affix the seal of said court, at Bowling Green, this 16th day of March, A. D. 1892.

A. L. MUIR, *Clerk*,
By A. R. HARRISON,
Deputy Clerk. [SEAL.]

The undersigned says that by authority of the sentence certified to him as aforesaid he has safely kept the said Hiram P. McKnight up to this time and will continue to safely keep him until the term of his confinement, as set forth in said sentence, expires or he is pardoned or otherwise lawfully released.

The undersigned state further that the said court of common pleas of Wood county did render the judgment and pro-
62 nounce the sentence by virtue of which he holds in custody the said McKnight; that said court had jurisdiction so to do; that said judgment was afterwards affirmed by the circuit court of Wood county in a proceeding in error prosecuted by said McKnight for its reversal, in which proceeding the entire record was reviewed; that afterwards the entire record and proceedings of the court of common pleas and circuit courts in the case in which McKnight was convicted was brought before the supreme court of Ohio on a motion made by McKnight for leave to file a petition in error to reverse the judgment of the common pleas and circuit courts aforesaid; that the supreme court of Ohio, after reviewing the entire record and proceedings in the lower courts, denied the application, thus affirming and sustaining the judgments of the court of common pleas by virtue whereof the undersigned hold McKnight in custody. Wherefore he prays the honorable judge to remand the prisoner to his custody, to serve the balance of the term of imprisonment to which he was sentenced for violation of the laws of Ohio.

C. C. JAMES,
Warden of the Penitentiary of Ohio.

63 [Endorsed:] Circuit court, Franklin county. State *ex rel.* H. P. McKnight *v.* C. C. James, warden. Return of warden to writ of *habeas corpus*. (3.) Filed Aug. 31, 1894. Chas. F. Galloway, clerk, by Jas. S. Walters, deputy.

64 In Circuit Court of Franklin County, Ohio.

THE STATE OF OHIO *ex Rel.* HIRAM P. McKNIGHT *vs.* CHARLES C. JAMES, Warden Ohio Penitentiary.	Reply to Defendant's Return.

The above-named Hiram P. McKnight, relator herein, in reply to the return filed in the above-entitled cause alleges and says—

That he denies each and every material allegation therein alleged and set forth, except such ones as are herein expressly affirmed, and reaffirms each allegation in his petition.

He also alleges and says that on the 7th day of March, A. D. 1892, in the common pleas court of the county of Wood and State of Ohio, before Artemus B. Johnson, judge of said court, he was placed upon trial of an indictment charging him with having committed the crime of forgery and uttering forged instrument under section 7091 of the Revised Statutes of Ohio. Said cause was known in said court as "No. 1168." Relator entered a plea of not guilty to said indictment, and when brought before said court upon said charges was without counsel and indigent and
65 unable to procure counsel, and he communicated the same to said court. Said court proceeded to and did try relator thereon without any counsel to defend him, and he was without counsel during the entire trial, and thereby was deprived of his constitutional right to have the assistance of counsel in his defense. Relator did not waive his right to have such counsel.

Relator also says that said court assigned able counsel to assist the prosecuting attorney in the trial of said cause.

Relator further alleges that said court had no power, authority, or jurisdiction to try relator upon said charge until it first provided him with counsel, as provided by law.

Relator also alleges that said court then and there suspended the operation of section 7245 of the Revised Statutes of Ohio in violation of section 18 of the first article (bill of rights) of the constitution of the State of Ohio, and thereby deprived him of a constitutional right.

Relator also says that at the conclusion of said trial the following sentence and judgment was entered, to wit:

66 "STATE OF OHIO } No. 1168. Indictment for Forgery
vs. and Uttering Forged Instrument.
HIRAM P. MCKNIGHT. }

"This day again came said defendant, in charge of the sheriff, and the State of Ohio, by its attorneys, and thereupon was heard the motion of the defendant for a new trial of this cause; upon consideration whereof the court do overrule said motion; to which ruling the defendant excepted.

"And the defendant, on being inquired of by the court, having nothing to say why the sentence of the court should not be pronounced against him and it appearing to the court that the crimes charged in the first and second counts of said indictment were but a single transaction, and that but one penalty, therefore, should be imposed,

"It is therefore considered and adjudged that said defendant, Hiram P. McKnight, should be imprisoned in the Ohio penitentiary, at Columbus, Ohio, for a period of seven years, and that he pay the costs of prosecution, taxed at $8—."

Relator also alleges that said court had no power or authority to

pronounce said judgment or sentence, because said proceedings were unconstitutional and void.

67 Relator further alleges and says that he is deprived of his liberty by the State of Ohio without due process of law, and denied by said State while within its jurisdiction the equal protection of the laws, and that said imprisonment is in violation of the Constitution and laws of the United States.

Therefore the said Hiram P. McKnight prays that said imprisonment be declared illegal and void, and that he be discharged therefrom, and for all other relief he may be in law and equity entitled to.

HIRAM P. McKNIGHT.

THE STATE OF OHIO, }
Franklin County, } *ss:*

Hiram P. McKnight, being first duly sworn according to law, says that the facts set forth in his foregoing reply are true.

HIRAM P. McKNIGHT.

Subscribed and sworn to before me this 31st day of August, 1894.

GILBERT H. STEWART,
Circuit Judge.

68 [Endorsed:] Franklin circuit court. Ohio *ex rel.*, &c., *vs.* Warden. Reply. (4.) Filed Aug. 31st, 1894. Chas. F. Galloway, clerk, by Jas. S. Walters, deputy.

69 THE STATE OF OHIO, }
Franklin County, } *ss:*

To the sheriff of said county, Greeting:

You are hereby commanded forthwith to serve the within writ of *habeas corpus* upon Charles C. James, warden of the Ohio penitentiary.

You will make due return of this order on the 31st day of Aug., A. D. 1894.

Witness my hand and seal of said court this 24th day of Aug., A. D. 1894.

CHAS. F. GALLOWAY,
Clerk of Court of Common Pleas of F'k. Co., Ohio.

Sheriff's Return.

Aug. 24th, 1894.—Served the within-named C. C. James, warden, personally with the certified copy of *habeas corpus* herewith, as by this order I am commanded.

Fees, $1.25.

JAMES ROSS, *Sheriff,*
By W. W. SLEMMONS, *Deputy.*

70 [Endorsed:] Doc. 22. No. 30484. Hiram P. McKnight *vs.* Chas. C. James, warden. (2.) Returned and filed Sept. 3d, 1894. Chas. F. Galloway, clerk, by Geo. F. Mitchell, deputy.

71 THE STATE OF OHIO, } *ss:*
Franklin County, }

I, Charles F. Galloway, clerk of the circuit court in and for said county, do hereby certify that the foregoing is a true transcript of all the journal entries of said court in the above-entitled cause, and that the said —— —— entered into a written undertaking, with approved sureties, conditioned to abide and perform the order and judgment of the supreme court, and to pay all moneys, costs, and damages which may be required of or awarded against said —— —— by said supreme court; and I further certify that the papers herewith sent, numbered from one up to —, are the original papers and pleadings filed in the above cause of —— ——, plaintiff, against —— ——, defendant.

Seal Circuit Court, Franklin County, Ohio.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at the court-house, in Columbus, Ohio, on this 24 day of Sept., A. D. 1894.

CHARLES F. GALLOWAY, *Clerk.*
By JOS. W. WICKHAM, *Dep. Clerk.*

72 [Endorsed:] No. 983. Docket 2, page 412. Franklin county. The State of Ohio *ex rel.* Hiram P. McKnight *vs.* Charles C. James, warden Ohio penitentiary. Certificate of journal entries.

73 THE STATE OF OHIO, } *ss:*
Franklin County, }

I, Chas. F. Galloway, clerk of the circuit court within and for said county, hereby certify that the above and foregoing is truly taken and copied from the original papers & records now on file at my office.

Seal Circuit Court, Franklin County, Ohio.

Witness my hand and the seal of said court this 28th day of September, 1894.

CHAS. F. GALLOWAY, *Clerk.*
By JOS. W. WICKHAM, *Deputy.*

Fees for this	4 85
Paid	2 00
Bal. due	2 85

Paid in full by H. P. McKnight.

74 [Endorsed:] No. 983. The State of Ohio *ex rel.* Hiram P. McKnight, plaintiff, — Charles C. James, warden Ohio penitentiary, defendant. Certified copy of record.

75 UNITED STATES OF AMERICA, *ss:*

To Charles C. James, warden of the Ohio penitentiary, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of Ohio, second judicial circuit, wherein The State of Ohio *ex rel.* Hiram P. McKnight is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, Associate Justice of the Supreme Court of the United States, this sixth day of October, in the year of our Lord one thousand eight hundred and ninety-four.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

76 On this 17th day of October, in the year of our Lord one thousand eight hundred and ninety-4, personally appeared Dora Sandoe Bachman before me, the subscriber, a notary public in and for the county of Franklin, State of Ohio, and makes oath that she delivered a true copy of the within citation to Charles C. James, warden Ohio penitentiary.

DORA SANDOE BACHMAN.

Sworn to and subscribed the 17th day of October, A. D. 1894.

[Notarial Seal, Franklin County, Ohio.]

J. L. BACHMAN,
Notary Public in & for Franklin County, Ohio.

Endorsed on cover: Case No. 15,725. Ohio, second judicial circuit court. Term No., 841. Hiram P. McKnight, plaintiff in error, *vs.* Charles C. James, warden of the Ohio penitentiary. Filed November 10, 1894.

DEC 1894
JAMES H. McKENNEY.

United States Supreme Court.

THE STATE OF OHIO, EX REL. HIRAM P. MCKNIGHT,
Plaintiff in Error,

VS.

CHARLES C. JAMES, WARDEN OHIO PENITENTIARY,
Defendant in Error.

["In all criminal prosecutions, the accused shall enjoy the right to have the assistance for counsel in his defense." —U. S. Const., 6th Amendment; Ohio Const., Art. 1, Sec. 10.]

["*Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"—U. S. Const., 14th Amendment, Sec. 1.]

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR

In Propria Persona.

COLUMBUS, OHIO.
JOURNAL-GAZETTE PRINTING HOUSE,
1894.

United States Supreme Court.

THE STATE OF OHIO, EX REL, HIRAM P. MCKNIGHT,
Plaintiff in Error,

VS.

CHARLES C. JAMES, WARDEN OHIO PENITENTIARY,
Defendant in Error.

["In all criminal prosecutions, the accused shall enjoy the right to have the assistance for counsel in his defense." —U. S. Const., 6th Amendment; Ohio Const., Art. 1, Sec. 10.]

["*Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*"—U. S. Const., 14th Amendment, Sec. 1.]

BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On the 24th day of August, 1894, plaintiff in error sued out of the Circuit Court of Ohio, Second Judicial Circuit, a writ of *habeas corpus*, alleging that he was deprived of his liberty by the defendant in error without due process of law, and that he was denied by the State of Ohio the equal protection of the laws, in violation of the Constitution and laws of the United States. On the 31st day of August, 1894, said cause came on to be heard before Hon. Gilbert H. Stewart,

sitting at Chambers upon the plaintiff's petition, Warden's return and plaintiff's reply thereto. Upon said hearing, the testimony of plaintiff and a certified transcript of the final record of the only trial plaintiff had ever had in the Common Pleas Court of Wood County, Ohio, for forgery, was introduced in evidence in behalf of plaintiff. On the part of defendant there was introduced a pretended warrant of commitment and certificate of sentence bearing the seal of Wood County Common Pleas and its clerk's signature. All of which are preserved by bill of exceptions to this Court.

The following points were established by said proofs:

First—That plaintiff had never been convicted or sentenced, by the Wood County Common Pleas Court for forgery, except in the case, No. 1168, of which the record introduced was a true, full and complete transcript of that case.

Second—That the pretended warrant of commitment introduced by defendant was a certificate of a sentence that plaintiff "be imprisoned in the Ohio Penitentiary *and kept at hard labor for the term of seven years*," while the only sentence or judgment of that Court was that the plaintiff be imprisoned in the Ohio Penitentiary for the term of seven years."

Third—That upon the trial of that case the Court denied to plaintiff the right to a defense by counsel, and tried him without counsel.

Fourth—That the trial Court tied up by attachment all money and other property of plaintiffs and refused to

release any part of it, so that plaintiff could employ counsel. On the 1st day of September, 1894, said Chief Justice remanded plaintiff into custody of defendant and denied his prayer, to which plaintiff excepted, and on the 19th day of September, he filed his bill of exceptions, properly signed by said Judge, and on the 6th day of October, 1894, he sued out this writ of error from this Court, to correct that judgment or order of the said Chief Justice of the Circuit Court of Ohio, Second Judicial Circuit, sitting at Chambers.

The chief points relied upon by plaintiff in error are:

First—That the only warrant of commitment authorized by the laws of Ohio, to authorize the Warden to detain and imprison any person, is a certificate of a sentence duly pronounced and authorized by law as a punishment for crime, and will be found in Section 7330, Ohio Revised Statutes, which reads as follows:

"SEC. 7330. A person sentenced to the Penitentiary shall, within thirty days after his sentence, unless the execution thereof be suspended, be conveyed to the Penitentiary by the Sheriff of the County in which the conviction was had, and delivered into the custody of the Warden of the Penitentiary, together with *a copy of the sentence of the Court*, there to be safely kept until the term of his confinement expires, or he is pardoned; * * * * *." And the "certificate of sentence" returned by the Warden in this case was not a copy of the sentence of the Court, but contained a sentence of a different kind, of greater severity than the one pronounced by the Court, and a sentence that the Court was not even authorized to

pronounce in said case. See Record, pages —— ——. The only sentence authorized by law in that case will be found in Sec. 7091, Ohio Revised Statutes, which reads as follows:

"SEC. 7091. Whoever falsely makes, alters, forges any promissory note * * * * * or utters and publishes as true and genuine, any false, forged or counterfeit promissory note, * * * * * knowing the same to be false, forged or counterfeited, with intent to defraud, is guilty of forgery, and *shall be imprisoned in the Penitentiary not more than twenty years nor less than one year.*" It is further provided as follows:

"SEC. 7426. No work, labor, or service shall be performed within the Penitentiary except as herein provided for, unless it be expressly authorized by the board."

Therefore, plaintiff in error claims, that said warrant of commitment is false and counterfeit, and is not supported by the judgment or sentence of any Court. That the same is void, and the imprisonment thereunder is without due process of law.

Second—That the trial Court was without jurisdiction to try plaintiff in error in the absence of counsel to defend him, and by doing so deprived him of the equal protection of the laws, and suspended the operation of Section 7215, Ohio Revised Statutes, which reads as follows, viz.:

"SEC. 7215. After a copy of the indictment has been served, and opportunity had for receiving the same, as provided in the preceding section, the accused shall be brought into Court, and if he is without coun-

sel, and unable to employ any, the Court shall assign him counsel, not exceeding two, who shall have access to the accused at all reasonable hours ; * * * * *" This section affirms the constitutional right expressed in Art. 1, Sec. 10, Ohio Constitution, and the 6th amendment. Sec. 10, reads as follows :

" In any trial, in any Court, the party accused shall be allowed to appear and defend in person and with counsel." In suspending the operation of Sec. 7245, the Court violated Sec. 18 of Art. 1, of Ohio Constitution, which reads as follows :

"SEC. 18. No power of suspending laws shall ever be exercised, except by the General Assembly." It is, therefore, claimed that plaintiff in error is deprived of his liberty without due process of law, and denied the equal protection of the laws by the State of Ohio, in violation of the Supreme Law of the Land.

STATEMENT OF ERRORS.

First—The Court below erred in holding that the warrant of commitment returned by the Warden was a valid and legal cause of imprisonment.

Second—The Court erred in remanding plaintiff in error into custody of defendant in error.

Third—The Court erred in not discharging plaintiff in error.

Fourth—The Court erred in holding that the rights claimed by plaintiff in error were not protected by the United States Constitution and laws.

Fifth—The Court erred in holding that the Clerk of the trial Court could add to the sentence of the

Court anything that the Court might have added, and not invalidate the commitment.

Sixth—The Court erred in not sustaining petition of plaintiff in error.

Seventh—The Court erred in not sustaining the reply of the plaintiff in error.

Eighth—And other errors appearing upon the face of the record.

ARGUMENT.

First—Let us briefly review

THE HISTORY OF THE WRIT OF HABEAS CORPUS.

In brief, I shall use the space I have allotted for this purpose in speaking of one of the great institutions of English justice and the common law; an institution of high concern to this great nation and all of its citizens; of supreme practical interest to every jurist; the greatest bulwark and shield to personal liberty known to English history, the writ of

HABEAS CORPUS.

Its origin and history is of Anglo-Saxon jurisprudence. For the institution in its present form, we must go back into English history of very ancient times.

Since the Grand Assizes of anno domini 1176, a period of over seven hundred years, the writ of habeas corpus has been one of the sacred muniments of English liberty, standing out like an everlasting monument of English justice, together with other rights secured to all English-speaking people at the same time, and

incorporated into the fundamental principles of English jurisprudence as a protection to personal liberty.

While it was yet in its infancy the sturdy Barons at Runnymede took care to make it a part of the great charter, which they wrung from the faithless and treacherous John, the undutiful and degenerate son of its immortal founder; and since Magna Charta, in every struggle of the British people against the encroachments of the crown, in every popular upheaval or revolution, *in every advance toward a broader and larger liberty*, the recognition and maintenance of this institution has ever been stoutly insisted upon, so that to-day it would be easier to uproot the foundation of the British throne itself than to tear this venerated landmark from the British constitution or the affections of the British people.

Speaking Anglican, it has become a most sacred birthright of all American people.

The Revolution, which forever dissolved our political allegiance to the British crown, was purely of a political nature, and did not in the least deprive us of our inheritance of English liberty.

In the year anno domini 1787 it was adopted into our Federal Constitutional compact as a then existing right and ordained a part and parcel of the supreme law of the land by the people of this great nation as it had been prepared by our forefathers, the founders of our government.

Certain other existing rights at the same time recognized by our noble founders were embodied as a part of the same great compact.

The writ at once, after its establishment, became

one of definite and fixed utility, and the purposes for which it could be used were made clear and plain. Such rights as existed at the common law up to the time of the adoption of our Federal Constitution, that protected personal liberty from encroachment of arbitrary power, were the very rights designed to be protected and upheld by this great bulwark of personal liberty. And in the rapid and steady growth of our legal jurisprudence, both in England as well as America, it has gradually moulded each of these rights into fixed and indefeasible rights and thereby made them jurisdictional questions with our courts of law. In other words, our courts are *denied the power* to deprive persons of these rights, and many of them even so, if the accused should assent thereto; and all of them, unless by his *voluntary*, *unsolicited* express waiver thereof. All rights enumerated in this great compact are sacred and dear to all American citizens and subjects, and as they have come floating down to us upon the broad stream of the common law, from time "when the mind of man runneth not to the contrary," we owe to them a traditional reverence and cherish them as most sacred protections to personal liberty.

We are guaranteed purely a government of law, and if ever a nation was happy; if ever a nation was visibly blessed by God; if ever a nation was honored abroad and left at home under a government that we may conscientiously call a liberal government, it is our people, and such is our happy lot. First, the gospel has done it, and then justice has done it; and any person who feels it his duty to maintain and protect these things as they exist at the present time let him first see that

the altars of God are not polluted, and then turning himself to human affairs, strive for undefiled, pure, incorruptible justice, honoring, adoring and worshipping the just and true Judge, and abhorring as the worst enemy of all mankind he who is placed upon the judicial throne to judge after the law and enforce these sacred rights, and instead thereof arbitrarily smites contrary to the law.

These rights are not only held in traditional, popular reverence, but, in addition to our Federal Constitution, they have also been incorporated in our State Constitutions.

We need not stop here with these rights, but most of them have been brought to the immediate attention of our courts, and before the very eyes of our people, by way of Congressional and Legislative enactments. Our statute books abound with them in terms and language so positive that no judge, even of our most inferior courts, can misunderstand their meaning.

Of these rights which plaintiff in error has been denied I will speak more fully subsequently in their proper order.

OFFICE AND DOCTRINE OF THE WRIT.

It is now settled beyond controversy that the writ of habeas corpus ought not to subserve the purpose of a writ of error, or a petition in error; yet, where a person is held in prison without lawful authority, or by an order of a Court not acting within the *sphere* of its *authority*, a State Court will, in favor of personal liberty, grant the writ, not to review the whole case on error, but to examine the *authority* of the Court to

make the order to commit upon which the prisoner is held. Sec. 5727 O. Rev. Sts.

The doctrine of the writ was lately defined by this Court in Ex parte Terry, 128 U. S., 304, in the following language: "While the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the *sphere* of the *authority* of the Court, it is the appropriate remedy to obtain the discharge of one imprisoned under the order of a Court which has not jurisdiction to make the same."

Citing 100 U. S., 371; 101 U. S., 604; 18 Wall., 163; 93 U. S., 18; 106 U. S., 371; 123 U. S., 443–445; 113 U. S., 713-718:

This Court in *ex parte* Siebold, 100 U. S., 371, lays down the true doctrine of law as applied to constitutional questions to be, that if a person be indicted, tried, convicted and sentenced, and upon such sentence be committed to prison under a law that is unconstitutional, habeas corpus is the proper remedy, and the fact of a trial is a mere mockery, and does not prevent the writ. In that case the Court says: "An unconstitutional law is void, and is no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment."

Now, the conclusion is inevitable, that if a conviction under an unconstitutional law is void for that reason, and not a legal cause of imprisonment, a conviction contrary to constitutional provisions, without even the aid of an unconstitutional law, is, with stronger reason, absolutely void, and cannot be a legal cause of imprisonment, and habeas corpus the proper remedy.

Hence if the trial Court has arbitrarily or negligently deprived the prisoner of any of his constitutional safeguards, it has then stepped beyond its authority, and its proceedings then instantly become null and void, and this may be by act or omission.

Church Hab. Corp., Secs. 228 and 362.
100 U. S., 339.
1 Hughes, 598.
100 U. S., 399.
9 Rep., 366.

PRIVILEGE OF THE WRIT.

The privilege of this great bulwark of personal liberty is secured by our National and State constitutions to every citizen. It can only be suspended or withheld in cases of *invasion or rebellion*, as the *public* safety may require it.

Art. I, Sec. 9, ph. 2, Fed. Const.
Art. I, Sec. 8, Ohio Const.

Every American citizen is endowed with certain inalienable rights, among which we may class the right to enjoy the benefits of habeas corpus at all times, subjected to that reserved right of the National and State governments only to be employed in the extreme cases named, and *no other*.

OUR STATE JUDICIARY

As well as all judicial departments of our government, is delegated with the *duty* of enforcing applications for its invaluable benefits when properly demanded.

The statute of the State of Ohio in relation to the

writ, gives to the judges of our Courts, separately, at chambers, jurisdiction in all cases of unlawful imprisonment. Ohio R. S., Sec. 5727, which reads as follows: "Sec. 5727. The writ of habeas corpus may be granted by the Supreme Court, the Circuit Court, the Common Pleas Court, the Probate Court, *or by a Judge of either.*"

When a person who is unlawfully deprived of his liberty, makes his application to one of them, it is made the duty of such Judge to forthwith issue the writ. In the exercise of this power by a single Judge, or a Court, "*every case of unlawful imprisonment may be reached and examined into: no matter where or how the chains of captivity were forged, the power of the judiciary of this State is adequate to crumble them to the dust if an individual is deprived of his liberty contrary to the law of the land.*"

Ex parte Collier, 6 O. S., 55–59.

CONSTITUTIONAL RIGHTS INVADED.

It is contended on the part of plaintiff in error, that numerous constitutional rights have been invaded and contravened, by means of said proceedings had in said Court. That he has been denied and deprived of his most sacred safeguards to personal liberty, secured and guaranteed to him by both Federal and State constitutions, and legislative enactments.

I desire to direct attention to the many provisions of Federal and State constitutions which have been contravened, abrogated—yea, even swept aside as unnoticed, and not even recognized as worthy of notice by said Court in the proceedings in this case.

First—In all criminal prosecutions, the accused shall enjoy the right * * * * to have the assistance of counsel for his defense."

U. S. Court, 6th Amendment.

Second—"The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

U. S. Court, Art. 1, Sec. 2.

Third—"Nor shall any State deprive any person of life, liberty or property without due process of the law, *nor deny to any person within its jurisdiction the equal protection of the laws.*

U. S. Court, Sec. 1 of 14th Amendment.

Fourth—In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel. * * * *"

Ohio Const., Art. 1, Sec. 10.

Fifth—"No power of suspending laws shall ever be exercised except by the General Assembly."

Ohio Const., Art. 1, Sec. 18.

True, it has been contended by very high authority, and apparently not without some reason, that many of the rights and privileges guaranteed by our Federal Constitution are not applicable to, nor binding upon, the State Courts. This leads us to a truth which at first seems obscure and mysterious. But when we start out on this branch of inquiry let us first examine the Federal Constitution itself and see if this apparent mystery is not solved by its own provisions.

This compact is, *by itself*, made the "*supreme law of the land.*"

Article VI.

Moreover, the 14th Amendment also says who shall be citizens of the United States, and provides they shall also be citizens of the State wherein they reside.

How, then, protect citizens of the United States in the Federal Courts only, and not protect with the same law, which is the "supreme law of the land," citizens of each State in *any* Court?

How, then, "can the citizens of each State be entitled to all privileges and immunities of citizens in the several States," unless those who fall into the jurisdiction of our State Courts have conceded to them by such Courts, the same privileges and immunities that those who fall into the jurisdiction of our Federal Courts are entitled to, and cannot be deprived of, when enumerated in the Federal Constitution?

Again, *how then*, shall a State *not* deny to *any person* within its jurisdiction the equal protection of the laws?

We now turn to the preamble of our Federal Constitution and we find one of the six expressed prime objects of this great compact was, "and secure the blessings of liberty to ourselves and *our posterity*," as it was expressed by our forefathers, the founders of this great government. See also preamble to Ohio Constitution.

WHAT GROUNDS WILL AUTHORIZE PRISONER'S DISCHARGE.

When a person charged with crime is brought before a Court, that Court has no authority to proceed to the trial of the cause until it first fulfills each and every preliminary step pointed out by the law to secure to the accused his rights guaranteed to him by the Constitution and the law.

If the prisoner comes without counsel, it is the duty of the Court to assign him counsel.

Rev. Stats. of Ohio, Sec. 7245.
Cooley Const. Lim., 330 *et seq.*
1 Bishop Cu. Pro., Sec. 1014.
Martin vs. *State*, 51 Ga., 567.
6 Crim. L. Mag., 189.
Valle vs. *State*, 9 Tex. App., 57.
52 Mich., 295.

The right to counsel may be expressly rejected, but no waiver will be implied from a mere failure to employ or ask for counsel."

6 Crim. Law Mag., 189, and cases cited.

The constitutional right to have counsel to defend a prisoner is reiterated in Sec. 7245 quoted *supra*. In fact, that section is the act of the Legislature giving force to that provision of the State constitution (if such an act be necessary). This section was intended by the Legislature to point out, in what Courts, at what time or stage of the proceedings in a criminal case, and in what manner, this constitutional right to counsel should be accorded and secured to the prisoner. "Wherever the spirit of the Legislature leads, the judi-

cial tribunals are bound to follow," 1 O. S., 160–166. This question is a jurisdictional one. It goes to the power of the Court itself. The Common Pleas Courts of Ohio (the trial Court) are (is) of purely statutory jurisdiction. They cannot act in either civil or criminal cases except as pointed out by statute. They have no other power or authority.

Ohio Const., Art. 4, Sec. 4.
Stevens vs. *State*, 3 O. S., 453.

A Court can do nothing except as provided by law.
3 O. S., 453.
Brown on Juris., Sec. 12.

A Court is bound to see that a prisoner is protected in all his rights.

State vs. *Davis*, 66 Mo., 684.
52 Mich., 295.
6 Cr. L. Mag., 192.
Wh. Cr. L., Sec. 132.

The trial Court by judicial action suspended the operation of Section 7245 in violation of Sec. 18, Art. 1, Ohio Const. quoted *supra*. It also is in violation of and contravenes Sec. 1 of 14th Amendment to the United States Constitution, in that it deprives plaintiff in error of his liberty without due process of law, and denies to him the equal protection of the laws while within the jurisdiction of the State of Ohio. Its proceedings are therefore in disobedience of the mandates of the constitution and laws of the United States, and the State of Ohio, and void.

Hans Neilson, Petitioner, 131 U. S., 182.
U. S. R. S., Secs. 1977–1979 and 1980.

And plaintiff in error is entitled to relief by *habeas copus*.

U. S. R. S., Sec. 753.
Brown on Juris., page 275.

If upon a trial the Court *fails to secure* to the prisoner, any or all of his constitutional rights, it is a proceeding without due process of law, and void.

Brown on Juris., p. 275, and cases.

These rights were claimed by plaintiff in error in the Court below, and if he be deprived of his liberty by a process not due to the law, or if the *proceeding*, under which he is held, is in violation of any of his constitutional rights, either by act or omission, he has made out a case which entitles him to relief by *habeas corpus*, and the Court below in remanding him into custody, and not discharging him, committed an error which may be corrected by this Court.

U. S. R. S., Sec. 709.

Of the alleged warrant of commitment or "certificate of sentence," more will be said hereafter.

What the meaning of the Post Bellum Amendments is, has been very fully expounded by this Honorable Court in several well adjudicated cases, among which may be mentioned, the Slaughter House Cases, 16 Wallace, 36; the Civil Rights Cases, 109 U. S., 3; Ex parte Virginia, 100 U. S., 339; Ex parte Siebold, 100 U. S., 371; 102 U. S., 135–140; and numerous others.

The testimony of plaintiff in error taken in the Court below, and certified here by the bill of excep-

tions subjected to exception, was competent, relevant and admissible. It did not contradict any *express* recital in the record and was therefore admissible to prove any or all allegations in the pleadings.

Ratcliff vs. *Tetters*, 27 O. St., 66.
Shelton vs. *Tiffin*, 6 Howard, U. S., 186.
14 Howard, 340.
Bodurcth vs. *Goodrich*, 3 Gray, 508.
Spratt vs. *Spratt*, 4 Pet., 393.

TO THE POINT.

If the omission appears upon the face of the record, the prisoner shall be discharged by habeas corpus. He may show that the jurisdiction of the Court has been exceeded; that there has been some act, or *omission since process issued*, which entitles him to be discharged.

Church Hab. Corp., Sec. 233.
U. S. R. S., Sec. 753.

In all criminal prosecutions, the jurisdiction of the trial court consists of three things, viz.:

First—Jurisdiction of the subject-matter; that is, was the alleged crime claimed to have been committed within the territorial limits to which the authority of the Court assuming to act applies.

Second—Jurisdiction of the person; that is, is the prisoner *before* the Court upon *legal process* authorized by law.

Third—Jurisdiction of the *proceedings themselves;* that is, has the Court, after obtaining jurisdic-

tion of the subject-matter, and the person of the prisoner, taken all steps which it is *its bounded duty to take*, in order to pronounce a valid judgment.

Brown on Juris., p. 275.

If the petitioner is deprived of his liberty contrary to any provision of the United States Constitution, or any law or treaty of the United States, he may make his application for the writ to either Federal or State Courts for his discharge therefrom. And if the *record* on the hearing of the writ shows the act, or *omission* complained of, he will be forthwith discharged.

U. S. Rev. Stats., Sec. 753.
Church, Secs. 228 and 362.
Ex parte Bridges, 2 Woods, 428.
In re Bull and Turtle, 4 Dill, 323.
In re Won Yung Qui, 9 Rep., 366.
Ex parte Clark, 100 U. S., 399.
Ex parte McCreedy, 1 Hughes, 598.
100 U. S., 339.
14 Am. L. Reg., 320.

JURISDICTION MAY BE LOST DURING TRIAL.

If a person be deprived of his liberty by the order of *any Court*, secured in violation of his constitutional rights, such trial, conviction and sentence is *absolutely void*, and not a legal cause for such imprisonment. The fact of a trial is a mere mockery, and does not prevent the writ, and *habeas corpus* is the proper remedy.

Ex parte Siebold, 100 U. S., 371.
Neilson's Case, 131 U. S., 182.

"An unconstitutional law is void, and is no law. An offense created by it is no crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause for imprisonment."

100 U. S., 85, 339 and 371.

Therefore, the conclusion is inevitable, that where the trial Court, of its own arbitrary power, during the trial of any criminal case, either by act *or omission*, deprives the prisoner of any constitutional right or privilege, its proceedings become null and void for that reason.

It is a well settled principle of law, that all constitutional rights go to the jurisdiction of the Court.

Neilson's Case, 131 U. S., 182.
9 Am. and English Encyclo. of Law, Title, Habeas Corpus.

In applying our "sifting process" to the entire lot of constitutional rights and privileges heretofore enumerated, as having been denied petitioner, we find they are all submerged in that one great principle expounded in Sec. 1 of the 14th Amendment, viz.: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

In the case at bar the great State of Ohio appeared by her regular prosecuting attorney, and not being satisfied with this, assigned able counsel to assist in such prosecution (if it may be called one), and upon the part of the accused, left him without *any* counsel to assist him in his defense, he being unable to employ counsel, because the Court deprived him of the

use of his money and property before trial. (Record, p. —.)

If this be an equal protection of the laws, I cannot understand what would be inequality.

Judge Cooley says, "a 'trial' under such circumstances would be only a *judicial murder.*"

Cooley Const. Lim., 405, Note 1.

Again, that same great jurist and author says, "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel."—*Ibid*, 406.

Moreover, he again says, that the trial of a person accused of crime, in the absence of counsel, is *a most horrible feature of the law.—Ibid.*, 404.

He also says: "The right to counsel is unquestionably the most important constitutional right secured to a person charged with crime."

WHAT THE RECORD MUST SHOW.

When the authority of a Court to act in any case is drawn in question and denied, it must be proved *by the record* itself, that the Court actually possessed authority to make the order, or entertain the proceeding complained of. When the record recites certain steps to have been taken, and they are insufficient in law, the record is self-impeached and judgment void.

13 Ohio St., 439.
Hawes on Juris., Sec. 259.
Ohio Rev. Sts., Sec. 5331.
7 Ohio (pt. 1) 257–8.
17 Ohio, 409.
18 Ohio, 323.

In the case at bar, the record shows upon its face the omission complained of, and does *not* show that the prisoner waived it. (See Record, pages ——)

The record must show upon its face, that the accused was not denied the equal protection of the laws, but that the same was granted to him.

13 O. S., 439.
131 U. S., 182.
13 O. S., 573.
Hotelling vs. *State*, 3 Ohio Cir. Ct., 634.

WARRANT OF COMMITMENT.

The Warrant of Commitment is void upon its face. The only Warrant of Commitment authorized by law, to justify an imprisonment in the Ohio Penitentiary, will be found in Section 7330, Ohio Rev. Sts., quoted *supra*. By that Section nothing but a *copy* of the Sentence of the Court shall operate as a legal cause of imprisonment. The Warrant of Commitment, returned by defendant as the cause of imprisonment, is not a copy of the Sentence pronounced by the Court. It contained a "Sentence" of a different character, of a different nature, *of greater severity*, in fact another and different sentence than that pronounced by the Court, and therefore was *false, forged* and *counterfeit*. Had the Clerk of the Court entered upon the records of that case a judgment that the prisoner "be imprisoned in the penitentiary of the State and kept at hard labor for the term of seven years," in lieu of the sentence of the Court that he "be imprisoned in the penitentiary for the term of seven years," it would have been a felony under the laws of Ohio,

and would have constituted an altering of a judgment of a Court and would therefore have rendered the *entire judgment void.* This is the rule in civil cases, and why should not the same prevail *in favorem libertatis.*

In *Hardy* vs. *Broaddus*, 35 Texas, 668, (Freeman on Judgments, § 148*a*.) the Supreme Court of that State received a *collateral attack* on a judgment entered by default for $4,400, and the clerk in entering up the same added to it for interest $100, thereby making the judgment $4,500, all of which the Court might have done. The Supreme Court said the rule making void a bond, bill or note, by adding thereto anything, or altering the same, applied to judgments of Courts of record with stronger reason than to notes, bonds or bills. This case the Court said was without precedent. And I may say that the case at bar is a *criminal* case without precedent. Now, it appears to me reasonable and logical, that if a judgment be rendered void by the clerk entering of record one slightly different from the one pronounced by the Court, (35 Tex., 668) with stronger reason would a Warrant of Commitment be void for the clerk's entering a sentence other than that pronounced by the Court. In certifying a commitment for the imprisonment of a person is a ministerial act, in which the clerk has no judicial power and can only make a *copy of the sentence of the Court.* Sec. 7330, O. R. S. *supra.*

A *hard labor* sentence, and one of base imprisonment are recognized in Ohio as separate, distinct, and different sentences by the legislature of that State. O. Rev. St., Sec. 6800; hence, " wherever the spirit of

the legislature leads the judicial tribunals are bound to follow. 1 O. S., 160-166. The clerk had no more right to change the sentence of the Court from bare *imprisonment*, to *imprisonment at hard labor*, than he had to make it solitary confinement, or any other form he might have chosen.

A sentence of *imprisonment at hard labor* is not authorized by the laws of Ohio as a punishment for forgery, of which plaintiff in error stood charged. Section 7091, O. R. S. quoted *supra*, defines forgery, and prescribes the only punishment therefore. Hence, a judgment or sentence of *imprisonment at hard labor*, or *solitary confinement*, if pronounced by the Court would be unauthorized by law, and void.

State vs. *Looper*, 14 Richardson, (S. C.) Law 92.

If the *Court* exceeds its authority by pronouncing a judgment or sentence not authorized by law, it is void, and *habeas corpus* is the proper remedy to relieve a person imprisoned thereby, (Brown on Jurisdiction, pages 271-282 and 283.) Therefore, I repeat, with stronger reason if the clerk certifies such a judgment in the Warrant of Commitment, without the authority of the Court or law, the *Warrant of Commitment* is *void*, and imprisonment thereunder is without due process of law and void, and he may have relief by *habeas corpus*.

SUMMARY AND CONCLUSION.

The rights relator complains of having been deprived, viz: The right to counsel; the right to be deprived of his liberty only by due process of law; and

the right to enjoy the equal protection of the laws, are all well-settled rules of the common law, imbedded in the salutary and fundamental principles underlying a just and true government of law and our National and State Constitutions, and one that reaches out and protects principles of justice and rights secured to all our citizens under the law.

The authorities heretofore cited, and more especially the cases with citations therein, together with our Constitutional and statutory provisions, are decisive in their language, and in unerring terms expound the true doctrine, unnecessary for repetition here, and virtually set at rest this prime question.

THE LEADING CHARACTERISTICS

Of our administrative system are, that all public officers that carry it on are governed by the law of the land as administered by the ordinary tribunals. Even if a judge of one of our inferior Courts steps aside from principles which are well settled, this does not in the least impair the rights of the person so wronged, and a judgment of any Court, assuming to act in the premises wherein the law itself does not give such authority, is a perversion of justice, and *habeas corpus* is the proper remedy in such cases, when any person is deprived of his liberty thereby. It is *the* remedy in criminal cases to prevent execution of an invalid and illegal judgment, the same as an injunction in civil cases. These public officers are not protected by an administrative code made especially for their benefit and construed by a special tribunal in their interest. Under the English and American administrative system

the illegal act of any public functionary can be at once assailed in an *ordinary Court of law*, and thus the authority and virtue of what we call the supremacy of the law is upheld. Of this principle Prof. Lieber, in his valuable treatise on "Civil Liberty and Self-government," at page 91, has said: "The guarantee of the supremacy of the law leads to a principle which, so far as I know, it has *never been attempted* to transplant from a soil inhabited by Anglican people, and which nevertheless, has been in our system of liberty the natural protection of a thorough government of law as contradistinguished to a government of functionaries."

It may be truly said that imprisonment under an unconstitutional law is void and not a legal cause of imprisonment, and *habeas corpus* the proper remedy, (100 U. S., *ibid*), what then can be said of imprisonment contrary to Constitutional provisions and the supreme law of the land without even the aid of an unconstitutional law?

In conclusion I say, the allegations of the petition of plaintiff in error are true. The pretended warrant of commitment returned by defendant in error with the writ of *habeas corpus* is *false*, *forged* and *counterfeit*, and there is no judgment or sentence of any Court supporting the same. The allegations of plaintiff in error in his reply filed in the Court below are true, and the trial Court had no power to condemn the prisoner for want of a constitutional trial, and plaintiff in error is deprived of his liberty without due process of law, and denied by the State of Ohio, while within its jurisdiction, the equal protection of the laws. Therefore, the Court

below erred in not discharging plaintiff in error, and in remanding him into the custody of defendant in error, which error should be corrected, and the judgment entered therein reversed, and plaintiff in error ordered discharged by the Honorable Court and justice be administered as it should be done according to the Supreme Law of the Land.

Respectfully submitted,

HIRAM P. MCKNIGHT,

Plaintiff in Error,

Pro Per.

Office Supreme Court U. S.
FILED.
DEC 17 1894
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

No. 841—October Term, 1894.

HIRAM P. McKNIGHT, *Plaintiff in Error,*

vs.

CHARLES C. JAMES, WARDEN OF THE OHIO PENITENTIARY,
Defendant in Error.

IN ERROR TO HON. GILBERT H. STEWART, JUDGE OF THE CIRCUIT COURT OF OHIO, SECOND JUDICIAL CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

J. K. RICHARDS,
Attorney General of Ohio.

COLUMBUS, OHIO.
JOURNAL-GAZETTE PRINTING HOUSE.
1894.

Supreme Court of the United States

No. 841—October Term, 1894.

HIRAM P. McKNIGHT, *Plaintiff in Error*,

vs.

CHARLES C. JAMES, Warden of the Ohio Penitentiary,
Defendant in Error.

IN ERROR TO HON. GILBERT H. STEWART, JUDGE OF THE CIRCUIT COURT OF OHIO, SECOND JUDICIAL CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

This is a proceeding in error to reverse the order of Hon. Gilbert H. Stewart, one of the Judges of the Circuit Court of Ohio for the Second Judicial Circuit, made at chambers, remanding Hiram P. McKnight to the custody of the Warden of the Ohio Penitentiary, after a hearing upon the return of a writ of *habeas corpus* sued out by him.

In December, 1890, the prisoner was indicted in Wood County, Ohio, for the crime of forgery. Upon this indictment, he was extradited from New York. Subsequent to the finding of the indictment for forgery, the same grand jury indicted him for obtaining money by false

pretenses. Brought back to Ohio, McKnight, instead of being tried for the crime of forgery, was tried and convicted of obtaining money by false pretenses and sentenced to the penitentiary. While in prison under this conviction, he sued out in person a writ of *habeas corpus* before the Supreme Court of Ohio, on the ground that he had been extradited for one crime and tried and convicted of another in violation of certain constitutional rights; and argued his own case before the Supreme Court of Ohio, and was discharged from further imprisonment under that conviction.

Ex parte Hiram P. McKnight. 48 O. S. 588.

Subsequently, at the January term, 1892, of the Court of Common Pleas of Wood County, Ohio, the prisoner was indicted for the crime of forgery. Again acting as his own lawyer, on January 20, 1892, he moved to quash certain counts in the indictment, which motion was the same day heard and overruled. Then he demurred to the indictment and his demurrer was overruled. Being arraigned on the 20th of January, he pleaded not guilty. Afterwards, on the 7th day of March, 1892, he filed a motion for continuance, which was overruled and he was placed upon trial. He conducted his own defense, cross-examining witnesses, introducing evidence, and submitted to the Court nine separate requests to charge. The case having been submitted to the jury, he was found guilty, whereupon he made and argued a motion for a new trial, filing in support thereof his own affidavit, and that of F. A. Baldwin, an attorney at law of Wood County, who says in his affidavit that he was during the January term, 1892, of the Court of Common Pleas of Wood County, employed as the attorney for McKnight in certain criminal causes then pending, these causes, however, being other than the cause which was tried.

On the 15th of March, 1892, the motion for a new trial was overruled and judgment rendered and sentence pronounced as shown in the following entry:

"THE STATE OF OHIO, vs. HIRAM P. McKNIGHT. } Indictment for Forgery and Uttering Forged Instrument. No. 1,168.

"This day again came said defendant in charge of said Sheriff and the State of Ohio, by its said attorneys, and thereupon was heard the motion of the defendant for a new trial of this cause, upon consideration whereof the Court do overrule said motion, to which ruling the defendant excepted. And the defendant on being inquired of by the Court, having nothing to say why the sentence of the Court should not be pronounced against him, and it appearing to the Court that the crimes charged in the first and second counts of said indictment, were but a single transaction, and that but one penalty therefor should be imposed.

It is therefore considered and adjudged that said defendant, Hiram P. McKnight, shall be imprisoned in the Ohio Penitentiary at Columbus, Ohio, for a period and term of seven years, and that he shall pay the costs of this prosecution taxed at $———."

From this judgment the prisoner prosecuted error to the Circuit Court of Ohio, the petition in error being filed March 29, 1892, and signed by McKnight and Baldwin and Harrington as attorneys. The Circuit Court affirmed the judgment of the Common Pleas.

In neither the motion for a new trial or the petition in error filed in the Circuit Court, was it assigned as a ground of error that McKnight had been denied the assistance of counsel, or that he had been denied compulsory process for his witnesses; and it nowhere appears in the record of the case that he ever made any formal motion to the trial Court for the assignment of counsel, or any showing to the Court that he was without means to employ them.

In the fall of 1892, the prisoner, who was then and ever since has been serving the term of imprisonment to which he was thus sentenced for the crime of forgery, applied to Hon. William H. Taft, Judge of the United States Circuit Court for the Southern District of Ohio, for a writ of *habeas corpus*, setting out in his application that the Court of Common Pleas of Wood County had refused to assign him counsel in accordance with the law of Ohio, and had forced him to trial without sufficient time for preparation and without giving him an opportunity by compulsory process to secure the presence of certain material witnesses. Judge Taft refused to issue the writ for the reasons which are given in his opinion, reported in 52 *Federal Reporter, page* 799, where is printed a copy of the application of McKnight. For the convenience of the Court the decision of Judge Taft in this case is printed as an appendix to this brief, marked "Exhibit A."

Subsequently, the prisoner drew up another petition for a writ of *habeas corpus* and forwarded it to the Chief Justice of the Supreme Court of the United States, with an application for a writ to issue out of the Supreme Court. This petition was referred to Judge Taft by Mr. Justice Brown. In this petition McKnight changed the allegations, making them broader than those of the first petition. The second

petition alleged that McKnight had been denied the assistance of counsel, and also that he had been denied compulsory process for his witnesses. Because of the change in the allegations, Judge TAFT deemed it best to issue the writ, and McKnight was taken before him at Cincinnati, and the case was heard upon the evidence. The result of this hearing is stated in Judge TAFT'S opinion, a copy of which is printed as an appendix to this brief, marked "Exhibit B."

Judge TAFT says: "The evidence shows beyond a doubt, that the Court did not deny the prisoner the right of counsel, but that the prisoner had no counsel and appeared on his own behalf. The evidence satisfies me also, that the prisoner made no formal motion of any sort for the assignment of counsel, or any showing to the Court that he was without means to employ them. If he did make such a motion, and it was overruled, it is strange that he did not make it the basis of his motion for a new trial. Nor does the evidence satisfy me that the prisoner was denied any right to have witnesses summoned. On the day of the trial, the prisoner says he requested the issue of subpœnas for persons living two hundred miles away from the place of trial. If the Court declined to issue such subpœnas and run up the costs when there was no prospects of obtaining the witnesses before the trial closed, this was a reasonable exercise of discretion. The prisoner claims that the trial came on without notice to him. The affidavits filed by him for a new trial do not clearly disclose the absence of such notice. A motion for continuance is usually addressed to the discretion of the Court, and certainly no such abuse of discretion is here shown as to make it a ground for error. I do not mean to intimate by a discussion of the evidence, that it is within the province of this Court, even if the compulsory process

for witnesses had been denied, to hold that the Wood County Court was without jurisdiction on that account, and therefore release the prisoner. All I mean to say is, that the evidence does not disclose that those grounds exist upon which the prisoner claims he ought to be released, whether they would in law require his release or not."

The prisoner being thus remanded to the penitentiary, prosecuted error to the Supreme Court, which, after a hearing and argument in which he personally took part, affirmed the judgment of the lower courts of Ohio.

The prisoner then made application to the Supreme Court of Ohio for a writ of *habeas corpus* upon the ground that he was being illegally imprisoned. The Supreme Court refused to issue the writ.

Finally, the prisoner applied to Honorable Gilbert H. Stewart, a Circuit Judge of Ohio, sitting in chambers. In this application, the prisoner set out the certificate of sentence or warrant of commitment in the hands of the warden of the Penitentiary, and then averred that there was no judgment or sentence of the Court whatever authorizing said pretended warrant of commitment; that the same was a false, forged and counterfeit certificate of judgment and sentence that never existed, and that he was being imprisoned without any legal authority and without due process of law. In the face of this averment, Judge Stewart issued a writ and heard the case. The return of the Warden averred that the Court of Common Pleas of Wood County did render a judgment and pronounce the sentence by virtue of which he held the prisoner in custody; that the Court had jurisdiction to do so and that this judgment was affirmed by the Circuit Court and Supreme Court of Ohio.

The Warden having brought the convict before the

Judge with his return, McKnight filed a reply to the return, in which he again endeavored to set up the claim made before Judge Taft, that the Court tried him without any counsel to defend him, and that he did not waive his right to have such counsel. He then set out a copy of the sentence and judgment, showing that the Court sentenced him to be imprisoned in the Ohio Penitentiary at Columbus, for the period of seven years, and to pay the costs of prosecution, without saying that he was to be imprisoned at hard labor.

On the hearing, the only point urged by the prisoner in support of his claim that the judgment of the Court was void, and that he was being imprisoned without authority of law, was that while the copy of the journal entry of the judgment of the Court shows that he was sentenced to be imprisoned in the Ohio Penitentiary for seven years and to pay the costs of prosecution, the certificate of sentence forwarded to the warden and held by him, shows that he was sentenced to be imprisoned in the penitentiary *and kept at hard labor* for the term of seven years and to pay the costs of prosecution. In other words, his claim was that the mistake of the Clerk in not striking out the printed words "and kept at hard labor," which were in the form upon which he made out the certificate of sentence, invalidated and rendered null and void the judgment and sentence of the Court. While the copy of the journal entry set out in his reply shows that he was convicted of the crime of forgery and sentenced to be imprisoned in the penitentiary for seven years, nevertheless, because the Clerk erroneously certified to the Warden that it was the sentence of the Court that he be imprisoned *at hard labor* for seven years, therefore he

must be discharged and go free from the punishment fixed by law for his crime.

There was no testimony submitted to Judge Stewart, except a partial copy of the record of the proceedings upon the trial in the Court of Common Pleas of Wood County. This record was partial and incomplete, because it did not, and does not include the bill of exceptions containing the testimony upon which the prisoner was convicted. That testimony was and is conclusive as to his guilt.

Upon this hearing and testimony, Judge Stewart remanded the prisoner to the custody of the Warden. To reverse this order of this Judge of an intermediate Court of Ohio, inferior to the Supreme Court of Ohio, the writ of error to this Court was sued out.

I maintain:

1. *That this Court has no jurisdiction to review upon error the order of a Judge of the Circuit Court of Ohio, at chambers, remanding a convict to the penitentiary, after hearing upon a writ of habeas corpus, for such order was not a final judgment or decree of the highest Court of the State of Ohio, in which a decision in this suit could be had.*

2. *That this Court lacks jurisdiction in the premises, because there was no federal question set up or claimed by McKnight, before Judge Stewart, or considered or passed on by him.*

3. *If this Court has jurisdiction to review the order of Judge Stewart, it should affirm that order. The mistake in the certificate of sentence cannot invalidate the conviction. It is the sentence of the Court which authorizes the imprisonment of the convict, and not the warrant of commitment, and if the latter be incorrect, it may by reference to the records be corrected.*

Moreover, there is no material difference between the sentence of record and the sentence as copied in the mittimus or warrant of commitment; for imprisonment in the penitentiary necessarily, under the law of Ohio and the discipline of that institution, implies imprisonment at hard labor.

As to the claim that McKnight was deprived of a constitutional right by being denied the assistance of counsel, there is no foundation for this in fact and no support in law. He was not refused counsel, he preferred to act as his own counsel; and if there had been an error committed in this regard, it could only be corrected by proceedings in error. It cannot serve to secure his discharge on a writ of habeas corpus.

ARGUMENT.

I.

This Court cannot review upon error the order at chambers in a habeas corpus proceeding of a Judge of the Circuit Court of Ohio, because it is not the judgment or decree of the highest Court of Ohio in which a decision could be had.

The provisions of the Constitution of Ohio regulating the Judicial department is found in Article 4. The highest Court in Ohio is the Supreme Court, the Court of the people is the Court of Common Pleas, while intermediate between the Common Pleas and the Supreme Court is the Circuit Court.

The Constitution provides that the Supreme Court "shall have original jurisdiction in quo warranto, mandamus, habeas corpus and procedendo, and such appellate jurisdiction as may be provided by law." Section 2, Article IV.

"The Circuit Court shall have like original jurisdiction with the Supreme Court, and such appellate jurisdiction as may be provided by law." Section 6, Article IV.

"The jurisdiction of the Courts of Common Pleas, and of the Judges thereof shall be fixed by law." Section 4, Article IV.

The jurisdiction of the Supreme Court of Ohio is defined in the following section:

Section 6710. "A judgment rendered, or final order made, by the Circuit Court, any Court of Common Pleas, Probate Court, or the Superior Court of any city or county, may be reversed, vacated, or modified by the Supreme Court, on petition in error, for errors appearing on the record."

A final order is defined by the Statutes of Ohio as follows:

Section 6707. "An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order which may be vacated, modified, or reversed, as provided in this title."

Proceedings upon a writ of *habeas corpus* are regulated by Sections 5726 to 5753 inclusive, of the Revised Statutes of Ohio.

Section 5727 provides that the writ of *habeas corpus* may be granted by the Supreme Court, the Circuit Court, the Common Pleas Court, the Probate Court or by a Judge of either.

Section 5728 prescribes the requisites of the application for the writ.

Section 5729 provides: "If it appear that the person alleged to be restrained of his liberty is in custody of an officer under process issued by a court or magistrate, or by

virtue of the judgment or order of a court of record, and that the court or magistrate had jurisdiction to issue the process, render the judgment, or make the order, the writ shall not be allowed; or, if the jurisdiction appear after the writ is allowed, *the person shall not be discharged by reason of any informality or defect in the process, judgment or order.*"

Section 5747 provides: "When the writ is issued by a court in session, if the court has adjourned when the same is returned, it shall be returned before any judge of the same court; and when the writ is returned before one judge, at a time when the court is in session, he may adjourn the case into the court, there to be heard and determined."

There is a provision for the return, and then the following section:

Section 5741. "When the judge has examined into the cause of caption and detention of the person so brought before him, and he is satisfied that he is unlawfully imprisoned or detained, he shall forthwith discharge him from confinement. *On such examination the judge may disregard matters of form or technicalities in any mittimus or order of commitment by a Court or officer authorized to commit by law.*"

Section 5744. "If it appear that the prisoner is in custody under a warrant or commitment in pursuance of law, the return shall be considered *prima facie* evidence of the cause of detention."

The right to prosecute error in habeas corpus cases is secured by,

Section 5751. "The proceedings upon a writ of *habeas corpus* shall be recorded by the clerks respectively, *and may be reviewed on error as in other cases.*"

The foregoing being the provisions of the Constitution and Statutes of Ohio regulating proceedings in *habeas corpus* and conferring appellate jurisdiction on the Courts of Ohio, I submit the following propositions:

1. *The order of a Judge of the Circuit Court of Ohio after a return made to him upon a writ of habeas corpus, may be reviewed upon error in the Supreme Court of Ohio.*

2. *If this Court has any doubt with respect to this proposition, it will resolve its doubts in favor of the jurisdiction in error of the Courts of Ohio, and will not by a decision upon the point in advance of a decision of the Supreme Court of Ohio, restrict and curtail the appellate jurisdiction of the highest Court of Ohio.*

3. *If the order of a Circuit Judge made under the circumstances in this case cannot be reviewed on error in the Supreme Court of Ohio, neither can it be reviewed on error in the Supreme Court of the United States. To enable this Court to review it, it must be treated as the judgment or decree of a Court; and if the judgment and decree of a Court, it may certainly be reviewed on error by the Supreme Court of Ohio.*

1. My first proposition is, that the order made in this case by Judge Stewart may be reviewed upon error by the Supreme Court of Ohio.

By Section 6710, Revised Statutes of Ohio, a judgment rendered or final order made by the Circuit Court may be reversed, vacated or modified by the Supreme Court. The order of a Judge discharging or remanding a prisoner made after a return upon a writ of *habeas corpus*, is certainly a final order in the sense that it is the purpose and end of the proceedings upon the writ. The only question is, whether such order, when made by a Judge of the Circuit Court, is the order of a Circuit Court, within the meaning of Section 6710, defining the jurisdiction of the Supreme Court in Error. I submit that an examination of the Sections of the Statutes of Ohio regulating proceedings in *habeas corpus* show plainly that there is no distinction between the judgment or final order of a Court, and the judgment or final order of a judge in a hear-

ing after a return upon a writ of *habeas corpus*. The words "judge" and "court" are used indiscriminately throughout the chapter regulating *habeas corpus*.

Under Section 5737, the writ issued by a Court may be returned before a judge, and the writ issued by a judge may be returned before a court; and court or judge may make the final order remanding or discharging the prisoner.

Section 5740 provides: "The court or judge to whom the writ is returned, or the court into which it is adjourned, may, for good cause shown, continue the cause."

The next Section, Section 5741, speaks of judge alone in describing the method of discharge. [*Supra.*]

These references to the Sections regulating *habeas corpus* are sufficient to show that the law of Ohio does not distinguish between the action of a court and the action of a judge in discharging or remanding a prisoner who has sued out a writ of *habeas corpus*. I submit, therefore, that the action of a judge in the contemplation of these statutes is the action of a court, and may be reviewed as such.

This question has been passed upon indirectly by the Supreme Court of Ohio. Section 5751 of the chapter on *habeas corpus* provides that "the proceedings upon a writ of *habeas corpus* shall be recorded by the clerks respectively, and may be reviewed on error as in other cases." To give a judge like powers with a court in *habeas corpus* proceedings, to use the term judge and court indiscriminately throughout the chapter regulating *habeas corpus*, and then to end the chapter by saying that the proceedings upon the writ may be reviewed on error as in other cases, warrants the conclusion that this provision for review on error applies not only to the action of a court but also to the action of a judge.

In the case of *Ex parte Collier*, 6 O. S., 55, an attempt was made, by proceedings *in certiorari* before the Supreme Court of Ohio, to review and reverse the order of a judge of the Court of Common Pleas of Ohio, allowing a writ of *habeas corpus* and afterwards discharging a prisoner from the custody of a United States Marshal. The Court dismissed the writ of *certiorari* holding (see third proposition of the syllabus, which, under the rule of Ohio, states the law as found by the Court):

"A proceeding in *certiorari* to reverse an order made by a state judge, discharging a prisoner on *habeas corpus*, is, in its nature, a civil proceeding, and, by the 530th section of the Code, must be by *petition in error* and not by *certiorari*."

After referring to the provision of the Ohio law that the proceedings on a writ of *habeas corpus* shall be recorded and may be reviewed on error, and after holding that *habeas corpus* is a civil proceeding, the Court, by Judge BOWEN, says, bottom page 61:

"The word 'proceedings' includes, we think, nothing more than the doings of the judge who allows the writ, and is limited to the hearing before him. The filing of a petition in error is a proceeding before an other tribunal. It is new in its character, and affects a review of the decision of the judge, without forming any part of the case before him.

"The allowance of the writ; the bringing forward of the petitioner before the judge; the inquiry into the cause of his caption and detention; the introduction of evidence, and the liberation, or other disposal of the relator, are all to be governed by the act relating thereto; and, as to other questions, to be determined by some other tribunal, though arising out of the case made on the writ, the code prescribes the form by which they are to be governed."

In *King* vs. *King*, 38 O. S., 370, the Supreme Court of Ohio held that an allowance of temporary alimony by a judge at chambers, is a final order which may be reviewed on error. In this case, the original allowance was by a judge of the District Court, the Court which before the Circuit Court existed, was the intermediate Court between the Common Pleas and the Supreme Court. This decision was based upon the broad provisions of Section 6707, Revised Statutes (formerly Section 512 of the Code), which reads:

"An order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order which may be vacated, modified or reversed, as provided in this title."

The Ohio cases which seem to be in opposition to my contention, are the cases of *Sheldon* vs. *McKnight*, and *Atwood* vs. *Whipple*. In *Sheldon* vs. *McKnight*, 34 O. S., 316, it was held that an order made by a Common Pleas Court in extradition proceedings, directing the Sheriff to turn over a fugitive to the agent of the State making requisition, is not reviewable on error.

In *Atwood* vs. *Whipple*, 48 O. S., 308, it was held that an order of a judge of the Court of Common Pleas at chambers, overruling a motion to dissolve a temporary injunction, is not reviewable on error by the Circuit Court. In deciding this case, the Court says, at the top of page 314:

"If his application to the judge at chambers to vacate the injunction be overruled, in very many cases, it would not operate in furtherance of justice to allow a review on error of the order made at chambers, for, before such review could be had, the Court in which the action is pending

might determine on final hearing all the issues between the parties."

Of course, this reasoning does not apply to the order of a judge discharging or remanding a prisoner in proceedings in *habeas corpus*, because such order is a final order, and terminates the proceedings.

I am aware of the fact that in *Barbier* vs. *Connolly*, 113 U. S., 27, and in *Kurtz* vs. *Moffit*, 115 U. S., 487, error was prosecuted to this Court from the Superior Court of the City and County of San Francisco, and State of California, that being a Court inferior to the Supreme Court of California. But what this Court reviewed on error in those cases was the judgment and final order of a *Court*, and the highest Court of California in which a decision on the merits of the case could be had, for the Statutes of California regulating proceedings in *habeas corpus* do not provide for a review on error of the final judgment or order made by the State Court or Judge in such proceedings. See 4 Deering's Code and Statutes of California, Sections 1473 to 1509. On the other hand, the Statutes of Ohio regulating *habeas corpus* proceedings clearly provide for a review on error of the judgment or order of the Court or Judge before whom the petitioner is brought.

2. If this Court has any doubt with respect to the proposition just discussed, that a judge under the Ohio law in *habeas corpus* proceedings acts as a Court and his final order may be reviewed on error, certainly the Court will resolve its doubt in favor of the jurisdiction in error of the Courts of Ohio, and in this particular case will not, by a decision upon this point, in advance of a decision of the Supreme Court of Ohio, even by appearance, restrict and

curtail the appellate jurisdiction of the highest Court of Ohio.

The question whether the order of a Circuit Judge discharging or remanding a prisoner, is or is not reviewable on error in the Supreme Court of Ohio, is a question involving the construction of the Constitution of Ohio, and the laws of Ohio. The Supreme Court of Ohio is the proper tribunal to pass upon that question. (See opinion of Mr. Justice MILLER, *Pelton* vs. *National Bank*, 101 U. S., 143, 144.)

3. But if the order of a Circuit Judge of Ohio made under the circumstances in this case, cannot be reviewed on error in the Supreme Court of Ohio, neither can it be reviewed on error in the Supreme Court of the United States. To entitle this Court to review the order made by Judge STEWART, it must be treated as a judgment or decree of a Court. If it is the judgment or decree of a Court, it is a judgment or decree of the Circuit Court of Ohio; if it is the judgment or decree of the Circuit Court of Ohio, then it can be reviewed on error by the Supreme Court of Ohio, which is the highest tribunal in Ohio, and which is expressly given jurisdiction by the statute to review the judgments and orders of the Circuit Court; but if this order is not a judgment or decree of a Court, it cannot be reviewed by this Court, because this Court, under Section 709, of the Revised Statutes of the United States, is given authority to review only the judgment and decree of the highest *Court* of a state in which a decision might be had in this suit. No power is conferred by that section on the Supreme Court of the United States to review the order of a judge of a state Court, and more particularly the order of a judge of an inferior Court of a state. The word "judge" is not used in Section

709. The reference throughout is to the judgment or decree of a *Court*.

By this section, the Supreme Court of the United States is as much limited, in its appellate jurisdiction, to the review of the judgments of a Court of a state, as, by Section 6710, of the Revised Statutes of Ohio, the Supreme Court of Ohio is limited in its appellate jurisdiction, to the review of the judgments and final orders of inferior Courts of Ohio. If the Supreme Court of Ohio is limited in its jurisdiction, in error, to the review of a judgment of a Court, and, therefore, cannot review this order because it was an order of a judge, so likewise is the Supreme Court of the United States limited in exactly the same manner, because the statute which confers appellate jurisdiction on the latter, uses the word "Court" in the same way and in the same sense as the statute which confers appellate jurisdiction upon the former.

This Court has, in a number of cases, held that the action of a judge of the United States Court is separate and distinct from the action of the Court itself; and that, in certain cases, this Court, will not review the order of a judge of the United States Court, when it would review a similar order made by the Court itself. Thus, in *Carper* vs. *Fitzgerald*, 121 U. S., 87, it was held that no appeal lies to this Court from an order of a Circuit Judge of the United States, sitting as a judge and not as a Court, discharging a prisoner brought before him on a writ of *habeas corpus*.

Mr. Chief Justice WAITE, speaking for the Court, says, (page 89):

"The act of March 3, 1885, C. 353, 23 Stat., 437, gives an appeal to this Court in *habeas corpus* cases only from the final decision of a Circuit Court. The order of the judge

that the papers be filed and his order recorded in the Circuit Court, does not make his decision as judge a decision of the Court."

II.

This Court lacks jurisdiction, because there was no Federal question set up or claimed by the prisoner before Judge Stewart, or considered or passed on by him.

In the petition for the writ of error, it is averred, that in the cause passed on by Judge STEWART, there was drawn in question:

The validity of the authority exercised by the Warden on the ground of it being repugnant to the Constitution of the United States; also,

The right, privilege and protection claimed by the prisoner under the Constitution and laws of the United States; also,

The construction of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and sections of the Revised Statutes of the United States.

It is settled by this Court, that a petition for a writ of error forms no part of the record.

Manning vs. *French*, 133 U. S., 186;
Clark vs. *Pennsylvania*, 128 U. S., 395;
Warfield vs. *Chaffe*, 91 U. S., 690;
Butler vs. *Gage*, 138 U. S., 52.

To give this Court jurisdiction to review the judgment of a state Court because of the denial of a right claimed under the constitution or laws of the United States, it must

appear on the record that such right was specially set up and claimed at the proper time and in the proper way.

Leeper vs. *Texas*, 139 U. S., 462, 467.

As I said before, in point of fact, the only matter urged by the prisoner in support of his claim that he was being unlawfully imprisoned, was, that the certificate of sentence or warrant in the hands of the Warden stated that he had been sentenced to be imprisoned in the Penitentiary and *kept at hard labor* for the period of seven years, when, in point of fact, the judgment of the Court was that he be imprisoned in the Penitentiary for the term of seven years.

The crime of which the prisoner was convicted, is forgery, defined by Section 7091, of the Revised Statutes of Ohio:

"Whoever falsely makes, alters, forges, ... any promissory note for the payment of money . . . . . intending to defraud; or utters or publishes, as true and genuine, any such false, altered or forged matter, ... knowing the same to be false, altered, forged, etc., with intent to defraud, is guilty of forgery and shall be imprisoned in the Penitentiary not more than twenty years nor less than one year."

The sections of the Criminal Code bearing upon the question raised are:

"SECTION 6799: When any person is sentenced to imprisonment in the Penitentiary, the Court shall declare in its sentence for what period he shall be kept at hard labor, and for what period, if any, he shall be kept in solitary confinement without labor; and in all cases of conviction of an offense, the Court shall render judgment against the defendant for the costs of prosecution, including a jury fee of six dollars."

"SECTION 7330: A person sentenced to the Penitentiary shall, within thirty days after his sentence, unless the execution thereof be suspended, be conveyed to the Peni-

tentiary by the Sheriff of the county in which the conviction was had, and delivered into the custody of the Warden of the Penitentiary, together with a copy of the sentence of the Court, there to be safely kept until the term of his imprisonment expires or he is pardoned."

The effect of the provisions of Section 6799 is declared by the Supreme Court of Ohio in *ex-parte Clarke*, 50 O. S., 649. In that case, it was contended, by certain prisoners convicted of the crime of burglary, the punishment for which is defined in the same terms as is the punishment for forgery in the section quoted, that the part of the sentence of imprisonment in the Penitentiary, requiring them to be kept at hard labor, was without authority of law, and, therefore, the entire sentence was void. Upon this point, the Court said (page 659):

"SECTION 6835, of the Revised Statutes, provides that persons convicted of the crime of burglary shall be imprisoned in the Penitentiary not more than ten years nor less than one year. The section does not provide that any part of the imprisonment may be at hard labor; and because it does not, it is claimed that the sentence imposed upon the petitioners is excessive and void. By the codification of 1880, the criminal statutes are brought together in one division called 'Part Fourth,' consisting of eleven chapters, the first of which, under the head of 'general provisions,' contains various provisions of a general nature, by which the Courts are to be governed in the construction and administration of the laws embraced in the subsequent chapters. One of these general provisions is found in Section 6799, which reads as follows: [Quoting the section.] That section clearly authorized the sentence and judgment of which the petitioners are complaining. There was no necessity for the repetition of its provisions in Section 6835,

to give validity to the sentence at hard labor. We have not discovered that any of the sections of the statutes defining crimes and providing for their punishment in the Penitentiary, contain a provision, which in terms authorizes the Court to make imprisonment at hard labor a part of the sentence, nor in view of Section 6799 is it necessary they should, for by that, such authority is clearly conferred on the Courts in all cases coming within its provisions."

Now, the question whether the mistake of the Clerk in copying the sentence for the use of the Warden and setting out that McKnight was by the Court sentenced to be kept at hard labor, when, in point of fact, he was not, although by the law the Court had authority to sentence him to be imprisoned and kept at hard labor—this question, arising under the statutes of Ohio which I have quoted and the decision of its Supreme Court, is an Ohio question, and not in any sense a Federal question.

I shall discuss hereafter the question whether the mistake will avail to invalidate the sentence and nullify the judgment of the Court which convicted McKnight of the crime of forgery. It is sufficient now to point out that the question is not a Federal question.

Upon this point, I refer the Court to the case of *In Re Graham*, 138 U. S., 461, a case in which this Court affirmed the judgment of the Supreme Court of Wisconsin, refusing to issue a writ of habeas corpus for the discharge of Graham, who had been convicted of robbery and sentenced to the penitentiary for thirteen years, when the maximum punishment under the Wisconsin statute was ten years. The Wisconsin Court held that the judgment was not void, but only erroneous, being good for the term limited by the statute. This Court affirmed the judgment of the Wisconsin Court

on the ground that there was no principle of federal law invaded in such ruling.

The above question was the only question really presented to the Court; but it may be contended by the prisoner that the record shows that a Federal question was involved in the case, and he may point to his reply to the return in order to substantiate that contention. But does it?

The reply, after stating that he was placed on trial upon an indictment charging him with forgery, says:

"Relator entered a plea of not guilty to said indictment, and when brought before said Court on said charge was without counsel, and indigent, and unable to procure counsel, and he communicated the same to said Court. Said Court proceeded to and did try relator thereon, without any counsel to defend him, and he was without counsel during the entire trial and thereby was deprived of his constitutional right to have the assistance of counsel in his defense. Relator did not waive his right to have such counsel.

"Relator also says that said Court assigned able counsel to assist the Prosecuting Attorney in the trial of said cause. Relator further alleges that said Court had no power, authority or jurisdiction to try relator upon said charge until he first provided him with counsel as provided by law.

"Relator also alleges that said Court then and there suspended the operation of Section 7245 of the Revised Statutes of Ohio, in violation of Section 18 of the First Article (Bill of Rights) of the Constitution of the State of Ohio, and thereby deprived him of a constitutional right."

Certainly these allegations do not raise a Federal question. The claim is that McKnight was deprived of a right under a law of Ohio, namely, Section 7245, which provides

that "after a copy of the indictment has been served, or opportunity had for receiving the same, as provided in the preceding section, the accused shall be brought into Court, and if he is without counsel and unable to employ any, the Court shall assign him counsel, not exceeding two, who shall have access to the accused at all reasonable hours."

There is no claim that any right, title, privilege or immunity claimed under the Constitution of the United States was denied him.

The only other part of the reply that can possibly be relied on as presenting a Federal question, is the following allegation:

"Relator further alleges and says that he is deprived of his liberty by the State of Ohio without due process of law and denied by said State while within its jurisdiction, the equal protection of the laws, and that said imprisonment is in violation of the Constitution and laws of the United States."

But did a general averment of this character, without naming the particulars in which it is claimed that he was deprived of his liberty without due process of law and was denied by the State of Ohio the equal protection of the laws, and without specifying in what respect his imprisonment is in violation of the Constitution and laws of the United States,—did a vague and indefinite averment of this sort present to Judge STEWART at the proper time and in the proper way a Federal question upon which to pass?

I submit that to raise a Federal question before a State Court, the special right claimed under the Constitution of the United States, and denied the petitioner by the State Court, must be specified, so that the question may be fairly presented to and passed upon by the State Court.

All that Mr. Chief Justice FULLER says in the case of *Leeper* vs. *Texas*, 139 U. S., 468, applies to this case. The prisoner was convicted of forgery in the due administration of the criminal laws of Ohio. He has had the benefit of the decision of all the Courts of Ohio upon his case. Both the Circuit Court and the Supreme Court of Ohio have affirmed the judgment of the Court of Common Pleas of Wood County, and have found no error in the record of his conviction. In his application for a writ of *habeas corpus* before Judge STEWART, he did not set up any claim under the Constitution of the United States, and no Federal question was passed upon by Judge STEWART or raised before him.

III.

If this Court has jurisdiction, the order of Judge Stewart ought to be affirmed. The mistake of the clerk in making a copy of the sentence for the use of the Warden did not and cannot render void the real judgment and sentence which appears on the record in this case; and there is no merit in the claim that McKnight was deprived of a constitutional right by being denied the assistance of counsel.

1. As to the mistake in the certificate of sentence or warrant of commitment.

Under the law of Ohio, an error in pronouncing sentence and entering judgment, even to the extent of violating the statutes and attempting to impose punishment in excess of that authorized by law, does not render the conviction void or afford ground for the discharge of the convict on proceedings in *habeas corpus*. Much less will a clerical error

by the clerk in making a copy of the sentence for the use of the Warden do so. It is the judgment and sentence of the trial court, as set forth in its records, which authorizes the imprisonment of a convict, and not the mittimus or warrant of commitment. If the mittimus or warrant of commitment be incorrect, it may, by reference to the judgment or sentence as recorded, be corrected and the punishment of the law for the crime inflicted.

Section 5729, Revised Statutes of Ohio, of the chapter regulating *habeas corpus* proceedings, provides: "If it appear that the person alleged to be restrained of his liberty is in custody of an officer * * * * by virtue of a judgment or order of a Court of record, and that the Court had jurisdiction * * * * to render the judgment or make the order, the writ shall not be allowed, or if the jurisdiction appear after the writ is allowed, *the person shall not be discharged by reason of any informality or defect in the process, judgment or order.*"

This statute is simply declaratory of the well recognized rule of law, that the judgment of a Court having jurisdiction to render such judgment cannot be collaterally attacked, or summarily reviewed by proceedings in *habeas corpus*, whatever be the errors or irregularities. It is only a void judgment, a judgment that the Court had no jurisdiction to render, a judgment that can be treated as a nullity, which can be thus attacked or set aside. The remedy for the correction of errors or irregularities is by prosecuting error. If the trial Court had jurisdiction and committed error, an appellate Court may reverse the judgment and remand the case for a new trial. Thus the error may be corrected and yet the accused not escape the just punishment of his crime; but if errors can be reviewed by writs of *habeas corpus*, then

the commission of an error by a Court, though it had jurisdiction to punish the offender, may result in his complete escape, for the end of a writ of *habeas corpus* is the discharge of the prisoner.

In *Ex Parte Shaw* 7 O. S., 81, the relator Shaw had been sentenced to imprisonment for one year for horse stealing, when the statute required the sentence to be imprisonment for not less than three years. The Court held that this did not render the sentence void. "The Court had jurisdiction over the offense and its punishment. It had authority to pronounce sentence, and while in the legitimate exercise of its power, committed a manifest error and mistake in the award of the number of years of the punishment. The sentence was not void but erroneous. The writ of error and *habeas corpus* have each their separate offices. There are ample remedies provided for the correction of irregularities and errors in proceedings which result in conviction and in sentences, by a writ of error. For errors and irregularities in such cases, the summary remedy by *habeas corpus* cannot be had."

In *Williams* vs. *State*, 18 O. S., 46, where the sentence was indefinite, being "for a further term of ten years to commence at the expiration of the sentence aforesaid," and there being nothing in the record showing to what the term "aforesaid" relates, the case was remanded "for judgment and sentence upon the verdict of the jury, pursuant to law," the Court saying: "As the error in this case is only in the insufficiency of the judgment and sentence of the Court, their reversal will not affect the validity of the conviction."

In *ex parte Von Hagen*, 25 O. S., 426, where the petitioner upon a lawful conviction, had been erroneously sentenced to imprisonment in the workhouse for six months,

instead of for thirty days in the dungeon of the county jail, as prescribed by statute, the rule laid down in the *Shaw* case was followed, GILMORE, Judge, saying (bottom page 432): "The punishment inflicted by the sentence, in excess of that prescribed by the law in force, was erroneous and voidable, but not absolutely void."

These cases are sufficient to demonstrate, that under the law of Ohio, as construed by its Courts, the imposition by mistake of a sentence in excess of what the law permits does not render the conviction void. *Much less does the mistake made by a clerk in the copy of a valid sentence render the conviction and judgment void.*

To the same effect as the Ohio decisions cited, are the following decisions of other States:

Ex parte Bond, 9 S. C., 80;
People vs. *Kelly*, 97 N. Y., 212;
Ex parte Max, 44 California, 579;
Sennott's case, 146 Mass., 489;
In re McDonald, 74 Wis., 450.

In this Court, in the case of *In re Graham*, 138 U. S., 461, the judgment of the Supreme Court of Wisconsin refusing to issue a writ of *habeas corpus* for the discharge of a convict, who after conviction had been sentenced for robbery to imprisonment for thirteen years, when the maximum prescribed by the statute was ten years, was affirmed, the Court holding it had no right to interfere with the ruling of the Supreme Court of Wisconsin on the point.

In the recent case of *United States* vs. *Pridgeon*, 153 U. S., 48, 62, Mr. Justice JACKSON, speaking for the Court, states the rule clearly:

"Without undertaking to review the authorities in this and other Courts, we think the principle is established

that where a Court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits, does not render the legal or authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess, open to question and attack. In other words, the sound rule is that a sentence is legal so far as it is within the provisions of law and the jurisdiction of the Court over the person and offense, and only void as to the excess when such excess is separable and may be dealt with without disturbing the valid portion of the sentence."

2. *If an error in the sentence pronounced does not render a conviction void, how much less will a clerical mistake in the copy of a sentence avail to discharge a prisoner lawfully convicted of crime?*

The rule, as to mistakes in the commitment, is well stated in 9 American and English Encyclopedia of Law, 233:

"A prisoner legally sentenced cannot be discharged on *habeas corpus* for imperfection in the mittimus. A proper mittimus can, if needed, be supplied at any time, and if the prisoner be safely in the proper custody, there is no office for a mittimus to perform. The prisoner is detained by virtue of the judgment and not of the mittimus. A certified copy of the record of the sentence to imprisonment is sufficient to authorize the detention of the prisoner, without any warrant or mittimus." (Citing a number of cases.)

In the case of the *People* vs. *Cavanagh*, 2 Parker's Criminal Reports, 650, an order of one of the Justices of the Supreme Court of New York, discharging Cavanagh on proceedings in *habeas corpus*, because of a defect in the trans-

cript of conviction or warrant of commitment, was reversed by the Supreme Court, BROWN, Judge, saying for the Court, bottom of page 660:

"The learned Justice, before whom the proceedings under review were had, made an order that Cavanagh be discharged from his imprisonment on the ground that the transcript of conviction was not evidence of the final judgment of a competent Court of criminal jurisdiction, because no offense was stated. * * * In the transcript of the conviction the crime is briefly stated as a misdemeanor. No other term could have been employed more apt and significant. Besides, it has been shown that the want of form is no objection, nor is any defect or omission which may be supplied or remedied by further entry or motion."

Again, middle of page 661:

"If it became material to know of what particular misdemeanor the prisoner was convicted, in order to determine that the commitment was legal, resort might have been had to the record, if one had been made up and filed, and if not, to the indictment on which he was tried and convicted, and to which the entry in the minutes referred."

In brief, the Court held that the warrant of commitment was sufficient, but if it were not, it might be made so by a reference to the judgment of the Court and record of the proceedings in the case, and, therefore, the prisoner was not entitled to be discharged.

In *ex-parte Gibson*, 31 Cal., 619, the warrant of commitment stated that Gibson had been sentenced to imprisonment in the State prison for the period of fifteen years. This warrant of commitment was not only defective in form and unknown to the laws of California, but was erroneous in stating that the prisoner had been sentenced for fifteen

years, when the sentence of the Court was, in fact, for ten years. The Supreme Court went back of the warrant of commitment to the judgment and sentence of the Court, as shown by a certified transcript of the record of the case, saying, middle of page 623:

"The Attorney-General, however, who appears on behalf of the Warden of the State prison, exhibits a certified transcript of the proceedings against the petitioner in the District Court, consisting of the minutes of the trial, showing that the prisoner was convicted of murder in the second degree and final judgment by the Court, and claims that the petitioner should be remanded and held under this latter process until the expiration of the term for which he was sentenced, which, as appears from the certified copy of the judgment, was ten years instead of fifteen, as stated, in the process under which he is now held. If there is a valid judgment of imprisonment against the petitioner, rendered by a competent Court of criminal jurisdiction, of which a certified copy can be obtained, I have no doubt as to my duty in the premises. I am bound to retain the petitioner in custody until a regularly certified copy of the judgment has been obtained, or until a reasonable time has been allowed for that purpose, and then, if obtained, remand him."

The Court then goes on to consider whether the judgment of the Court was sufficient or not, and finally holds, bottom of page 629, that though the judgment may be erroneous in not stating more definitely the offense of which the prisoner was convicted, he is satisfied that it is not void, and, accordingly, the prisoner was remanded to serve the balance of the ten years for which he was sentenced.

In the present case there is no need to wait until a certified copy of the judgment of the Court can be obtained.

Such a certified copy is set out in the reply of the petitioner to the return of the Warden, and shows that the petitioner was duly convicted of the crime of forgery and was sentenced to imprisonment in the penitentiary for the term of seven years. The only difference between this judgment and sentence and the warrant of commitment in the hands of the Warden is that in the warrant of commitment or certificate of sentence, it is stated that the prisoner was sentenced to be imprisoned for a term of seven years, and *be kept at hard labor*. The words "and be kept at hard labor" happened to be inserted because they were in the printed form on which this certificate of sentence was made out.

In this Court, in *ex-parte Wilson*, 114 U. S., 417, it is plainly stated (see opinion of Mr. Justice GRAY, bottom of page 421), that it is the judgment and sentence of the Court, and not the mittimus or warrant of commitment, which authorizes the detention of the prisoner.

"The certified copy of the record of the sentence to imprisonment in the Detroit House of correction, is valid upon its face and is sufficient to authorize the keeper to hold the prisoner without any warrant or mittimus. *People* vs. *Nevins*, 1 Hill (N. Y.), 154."

3. *But all this discussion as to the effect of a mistake in the warrant of commitment might well have been omitted, for, in point of fact, there is no material difference between the sentence of record and the sentence as copied in the warrant of commitment the only difference is the addition of the words "and kept at hard labor," which are in the mittimus and not in the sentence itself; and imprisonment in the penitentiary necessarily, under the law of Ohio and the discipline of that institution, implies imprisonment at hard labor.*

Section 6799, of the Revised Statutes of Ohio, already cited, provides that when any person is sentenced to imprisonment in the penitentiary, the Court shall declare in its sentence for what period he shall be kept at hard labor.

The case of *ex-parte Clark*, 50 O. S., 649, already cited, holds that imprisonment at hard labor is required by this section 6799 to be a part of every sentence of imprisonment in the penitentiary.

In *ex-parte Karstendick*, 93 U. S., 396, 399, it was claimed on behalf of the petitioner that "*imprisonment in the penitentiary necessarily implies imprisonment at hard labor;* and where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as the consequence of the imprisonment is in excess of the power conferred."

Mr. Justice WAITE, speaking for the Court, thus made answer:

"We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the Court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to place it within the power of the Court, at its discretion, to order execution of *its sentence at a place where labor is exacted as a part of the discipline and treatment of the institution or not, as it pleases.* Thus a wider range of punishment is given, and the Courts are left at liberty to graduate their sentences so as to meet the ever varying circumstances of the cases which come before them. If the offense is flagrant, the penitentiary, with its discipline, may be called into requisition; but if slight, a corresponding punishment may be inflicted within the general range of the law."

In *In re Mills*, 135 U. S., 263, 266, Mr. Justice HARLAN said:

"*An offense which the statute imperatively requires to be punished by imprisonment 'at hard labor,' and one that must be punished by 'imprisonment' but the sentence to which imprisonment the Court may, in certain cases, and in its discretion, require to be executed in a penitentiary where hard labor is prescribed for convicts, are, each 'punishable' by imprisonment at hard labor.* The former offense certainly must be thus punished; and as the latter may, in the discretion of the Court, be so punished, it may, also, and not unreasonably, be held to be 'punishable' by imprisonment at hard labor."

In the case of *United States* vs. *Pridgeon*, 153 U. S., 49, this Court held that the imposition of hard labor, as a part of the sentence to imprisonment in the penitentiary, did not render the sentence void, although the law simply authorized the punishment of imprisonment. Mr. Justice JACKSON, speaking for the Court, after reviewing the cases of *ex-parte Karstendick* and *In Re Mills*, says, page 61:

"Under the rule announced in these cases, while the act of February 15, 1888, does not specifically authorize the imposition of 'hard labor' as a part of the sentence of imprisonment, still it was competent for the Court to sentence the party convicted to imprisonment in a penitentiary where 'hard labor' is a part of the usual discipline; *so that the provision for 'hard labor' in the sentence is nothing more or less than a sentence to simple imprisonment in the Ohio penitentiary, subject to its rules, regulations, and discipline, and if the sentence had been imposed in this form it could not justify the release of the prisoner on habeas corpus under the rule above announced. It is doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the 'hard labor' portion thereof.*"

4. As to the claim that McKnight was deprived of a constitutional right in not having counsel assigned him for defense.

This point was really not presented to or passed upon by Judge STEWART, but it will doubtless be urged upon the Court. I have already stated that this matter was presented to Judge TAFT, of the U. S. Circuit Court, and passed upon by him. Judge TAFT heard the evidence on this point and had before him the entire record of the original case, including the bill of exceptions, which contained a stenographic report of the testimony. I have already quoted what Judge TAFT found on the evidence as to the facts in the case. In brief, he found that the evidence before him showed beyond a doubt that there is no truth whatever in the claim that McKnight was deprived of the assistance of counsel. McKnight never asked the Court to assign him counsel; he never made any showing to the Court that he was unable to employ counsel; his own affidavits show that during the time of this trial he did have counsel employed in certain cases. Doubtless such counsel was used by McKnight simply to assist him, the fact being that he had more confidence in his own skill and ability as a lawyer than in any other lawyer he could obtain. In his testimony before Judge TAFT he stated that he had studied law at the Albany Law School, had been admitted to the bar in 1878 and had practiced law ever since. Before he was tried for the crime for which he is now suffering punishment, he had in person argued his petition for a writ of *habeas corpus* before the Supreme Court of Ohio against the then Attorney General of Ohio and the Prosecuting Attorney of Wood County and had secured a discharge. In his trial he defended himself ably, using every technical defense known to the criminal lawyer.

He moved to quash certain counts; he demurred to the indictment; when forced to plead, he tried for a continuance; he cross examined the witnesses; he objected to testimony; he introduced testimony on his own behalf; he filed eight or nine requests with the Court to charge certain propositions of law to the jury; after conviction he moved in arrest of judgment and for a new trial and then prosecuted error to the Circuit Court. Neither in his motion for continuance or motion for a new trial did he claim that he was without the assistance of counsel or had been denied the aid of counsel. He was convicted simply because the proof was irresistible. He has never at any time defended against this charge upon the merits; he has relied throughout and relies now upon technicalities. The claim that he was deprived of the assistance of counsel is an afterthought; it never occurred to him until after the Circuit Court had affirmed the judgment of the Common Pleas, when he cast about for some other ground of escape from punishment than those really appearing in the record. The claim that the mistake in the copy of the sentence rendered his conviction void is a still later afterthought. After Judge TAFT had allowed a writ and had heard his application upon the evidence and the entire record, including the bill of exceptions and original papers in the case, and had found there was nothing whatever in his claim that he had been denied the assistance of counsel and denied compulsory process for witnesses, he searched the record for yet another ground for a writ and found it, as he thought, in the mistake of the clerk.

The claim that he was denied the assistance of counsel has no foundation in fact, but if it had, it would not justify his discharge upon proceedings in *habeas corpus*. It would constitute an error or irregularity which could only be cor-

rected by proceedings in error. The cases in this Court have been uniform in holding that such an error if committed would not affect the jurisdiction by a Court of the person accused or of the offense on trial and could not be reached by *habeas corpus*.

In *Ex parte Yarbrough*, 110 U. S., 659, Justice MILLER, speaking for the Court, says, bottom page 653: "It is, however, to be carefully observed, that this latter principle does not authorize the Court to convert the writ of *habeas corpus* into a writ of error, by which the errors of law committed by the Court that passed the sentence can be reviewed here; for if that Court had jurisdiction of the party and of the offense for which he was tried, and has not exceeded its powers in the sentence which it pronounced, this Court can inquire no further.

Yarbrough had been convicted in a United States Court, and among other things insisted that he had been deprived of a constitutional right in not being informed of the nature of the accusation by a proper indictment (See Article V, amendments to Constitution U. S.), but this Court held that the sufficiency of the indictment was a question for the trial Court.

In *Ex parte Bigelow*, 113 U. S., 328, Mr. Justice MILLER again delivered the opinion of the Court. Fourteen indictments had been found in the Court of the District of Columbia against the prisoner, who sought his discharge by *habeas corpus*. That Court directed their consolidation and trial together. The jury was impanneled and sworn, the District Attorney made his statement, and the Court took a recess. Upon reconvening, the Court decided that the indictments could not be well tried together, discharged the jury, and rescinded the order of consolidation. The

prisoner was then tried and convicted on but one of the indictments. He insisted to this Court that he had been put in jeopardy by a partial trial, and that the Court was without jurisdiction to try and sentence him thereafter. Upon this point Mr. Justice MILLER said, page 330:

"But that Court had jurisdiction of the offense described in the indictment under which the prisoner was tried. It had jurisdiction of the prisoner, who was properly brought before the Court. It had jurisdiction to hear the charge and the evidence against the prisoner. It had jurisdiction to hear and to decide upon the evidence offered by him. The matter now presented was one of those defenses."

Speaking of the guarantees of the Constitution, he says, bottom page 330:

"This Article V of the Amendments, and Articles VI and VII, contain other provisions concerning trials in the Courts of the United States designed as safeguards to the rights of parties. Do all of these go to the jurisdiction of the Courts? And are all judgments void where they have been disregarded in the progress of the trial? Is a judgment of conviction void when a deposition has been read against a person on trial for crime because he was not confronted with the witness, or because the indictment did not inform him with sufficient clearness of the nature and cause of the accusation?"

"It may be confessed that it is not always very easy to determine what matters go to the jurisdiction of a Court so as to make its action when erroneous a nullity. But the general rule is, that when the Court has jurisdiction by law of the offense charged, and of the party who is so charged, its judgments are not nullities."

In *Ex parte Harding*, 120 U. S., 782, it was urged in support of the application for a writ of *habeas corpus*, that the constitutional right of the prisoner to be indicted by a legal grand jury and to have compulsory process for his witnesses had been violated. Mr. Chief Justice WAITE, speaking for the Court, says, page 784:

"The objection [to the composition of the grand jury], if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the Court. The same is true of the allegations in the petition, that the petitioner was denied his right to have compulsory process for obtaining witnesses in his favor. For such errors or irregularities, if they exist, a judgment is not void, and a writ of *habeas corpus* gives this Court no authority for their correction."

That case was stronger than this, because the trial was in a Territorial Court, under the guarantees of the Amendments.

In *In re Wood*, 140 U. S., 278, the composition of the grand jury was urged as the ground for the writ. Wood, who was convicted in New York of murder, was a negro, and claimed that negroes were excluded from the lists of grand and petit jurors. The Court, page 287, held that the question was one for the State Court to pass on. "If the question of the exclusion of citizens of the African race from the lists of grand and petit jurors had been made during the trial in the Court of General Sessions, and erroneously decided against the applicant, such error in decision would not have made the judgment of conviction void, or his detention under it illegal. The remedy would be by writ of error."

In *In re Jugiro*, 140 U. S., 291, it was urged that the accused *was denied the assistance of counsel, in not having proper counsel assigned him*; and also, that the grand jury

which indicted him was not properly drawn or constituted. Respecting these assignments, the Court, speaking by Mr. Justice HARLAN, says, bottom page 296, top page 297:

"These were all matters occurring in the course of the proceedings and trial in a Court of competent jurisdiction, proceeding under statutes that do not conflict with the Constitution of the United States. The errors, if any, committed by that Court in respect to any of those matters, did not affect its jurisdiction of the offence or of the person accused, and cannot be reached by *habeas corpus*."

This is exactly in point respecting McKnight's claim that he was denied the assistance of counsel.

In *In re Wilson*, 140 U. S., 575, it was held, that the deficiency in the number of grand jurors prescribed by the law would not vitiate the subsequent proceedings or authorize a discharge of the prisoner on *habeas corpus*.

The opinion delivered by Mr. Justice BREWER, reviews the cases beginning with *Ex parte Watkins*, 3 Peters, 193. In that case, Chief Justice MARSHALL said: "An imprisonment under a judgment cannot be unlawful, unless the judgment be an absolute nullity; and it is not a nullity if the Court has general jurisdiction of the subject, although it should be erroneous." Finally, in *McElvain* vs. *Brush*, 142 U. S., 160, this Court refused to interfere with the law of New York fixing the punishment for murder in the first degree, Mr. Chief Justice FULLER saying:

"As was observed by Mr. Justice HARLAN in *In re Wood*, 140 U. S., 278, 289, it was not intended by Congress that the Courts of the United States should, by writs of *habeas corpus*, obstruct the ordinary administration of the criminal laws of the States through their own tribunals."

In the recent case of *United States* vs. *Pridgeon*, 153 U.

S., 48, bottom of page 62, Mr. Justice JACKSON makes a clear statement of the general rule:

"Under a writ of *habeas corpus* the inquiry is addressed not to errors, but to the question whether the proceedings and the judgment rendered therein are, for any reason, nullities, and unless it is affirmatively shown that the judgment or sentence, under which the petitioner is confined, is void, he is not entitled to his discharge."

CONCLUSION.

TO SUM UP:

1. This Court cannot review upon error the order in a *habeas corpus* proceeding of a judge of the Circuit Court of Ohio, because it is not a judgment or decree of the highest Court of Ohio in which a decision could be had.

a. The order of a judge of the Circuit Court of Ohio remanding a prisoner brought before him upon a writ of *habeas corpus*, may be reviewed upon error in the Supreme Court of Ohio. By statute, proceedings in *habeas corpus* may be reviewed on error. The order remanding a prisoner is a final order. There is no distinction drawn in the Ohio Statutes between the final order of a Court and of a judge in *habeas corpus* proceedings. The Supreme Court of Ohio has authority to review any final order made by a Circuit Court.

Constitution of Ohio, Sec. 2, Art. IV (defining jurisdiction of Supreme Court);

Id., Sec. 6, Art. IV (defining jurisdiction of Circuit Court);

Id., Sec. 4, Art. IV (defining jurisdiction of Common Pleas Court);

Rev. Stat. of Ohio, Sec. 6710 (defining appellate jurisdiction of Supreme Court);

Id., Sec. 6707 (defining what is a final order);

Id., Secs. 5726 to 5753 (regulating proceedings on *habeas corpus*);

Id., Sec. 5751 (providing *habeas corpus* proceedings may be reviewed on error);

Ex parte Collier, 6 O. S., 55, 61.

King vs. *King*, 38 O. S., 370.

b. If this Court has any doubt with respect to this proposition, it will resolve its doubts in favor of the jurisdiction in error of the Courts of Ohio, and will not by a decision upon the point in advance of the decision of the Supreme Court of Ohio, seem to restrict and curtail the appellate jurisdiction of the highest Court of Ohio.

Pelton vs. *National Bank*, 101 U. S., 143, 144.

c. If the order of a Circuit Court made under the circumstances in this case cannot be reviewed on error in the Supreme Court of Ohio, neither can it be reviewed on error in this Court. To enable this Court to review it, it must be treated as the judgment or decree of a Court under U. S. R. S., Section 709; but if it is a judgment and decree of a Court, it may certainly be reviewed on error by the Supreme Court of Ohio. Section 709, U. S. R. S., restricts this Court in the same way and to the same extent that Section 6710, R. S. of Ohio, restricts the Supreme Court of Ohio.

U. S. R. S., Section 709 (defining appellate jurisdiction Supreme Court U. S.)

Rev. Stat. Ohio, Section 6710 (defining appellate jurisdiction Supreme Court of Ohio.)

Carper vs. *Fitzgerald*, 121 U. S., 87, 89 (drawing distinction between order of a Judge and of a Court.)

2. This Court lacks jurisdiction, because there was no Federal question set up or claimed by the prisoner before Judge Stewart, or considered or passed on by him. The petition for a writ of error forms no part of the record and it must appear on the record that a Federal question was raised at the proper time.

Leeper vs. *Texas*, 139 U. S., 462, 467.

The effect of the mistake in the certificate of sentence is a question involving a construction of Ohio Statutes, an Ohio question.

R. S., Ohio, Sect. 7091, (defining the crime of forgery.)

Id. Sect. 6799, (providing a sentence to imprisonment in the penitentiary must include hard labor.)

Id. Sect. 7330, (delivery of prisoner to Warden with copy of sentence.)

Ex parte Clark, 50 O. S., 649, (deciding imprisonment in the penitentiary includes hard labor.)

Whether the prisoner was deprived of a right to have counsel involves a construction of Section 18, Article I, Constitution of Ohio, and Section 7245 R. S. Ohio, and is not a Federal question.

The general averment that the imprisonment is in violation of the Constitution and Laws of the United States did not raise any Federal question and will be held to be limited to the specific averments, which raise only Ohio questions.

3. If this Court has jurisdiction, the order of Judge Stewart ought to be affirmed.

(*a.*) The reliance here is on an error in the copy of the sentence made for the use of the Warden. But if the error had been in the sentence itself, it would not nullify the judgment of the Court. An error in pronouncing sentence and entering judgment, even to the extent of violating the statutes and attempting to impose punishment in excess of that authorized by law, does not render the conviction void, or afford ground for the discharge of the convict on proceedings in *habeas corpus*. The imposition of the sentence in excess of what the law permits, does not render the authorized portion of the sentence void, but only leaves such portion of the sentence as may be in excess, open to question and attack.

R. S. Ohio, Sect. 5729.
Ex parte Shaw, 7 O. S., 81.
Williams vs. *State*, 18 O. S., 46.
Ex parte Von Hagen, 25 O. S., 426.
Ex parte Bond, 9 S. C., 80.
People vs. *Kelly*, 97 N. Y., 212.
Ex parte Max, 44 Cal., 579.
Scannell's case, 146 Mass., 489.
In re McDonald, 74 Wis., 450.
In re Graham, 138 U. S., 461.
In re Bonner, 151 U. S., 242.
U. S. vs. *Pridgeon*, 153 U. S., 48, 62.

(*b.*) If an error in the sentence pronounced does not render a conviction void, much less will a clerical mistake in the copy of the sentence do so. It is the judgment as recorded which authorizes imprisonment and not the war-

rant of commitment; if the warrant be incorrect, it may be corrected by reference to the records of the Court.

9 Am. and Eng. Ency. of Law, 233.
People vs. *Cavanaugh*, 2 Parker's Crim. Rep., 650.
Ex parte Gibson, 31 Cal., 619.
Ex parte Wilson, 114 U. S., 417, 421.

c. Moreover, there is no material difference between the sentence of record and the sentence as copied in the warrant of commitment, for imprisonment in the penitentiary, necessarily, under the law of Ohio and the discipline of that institution, implies imprisonment at hard labor.

R. S. Ohio, Section 6799 (imprisonment in penitentiary to be at hard labor).
Ex parte Clark, 50 O. S., 649.
Ex parte Karstendick, 93 U. S., 396, 399.
In re Mills, 135 U. S., 263, 266.
U. S. vs. *Pridgeon*, 153 U. S. 49, 61.

d. As to the claim that McKnight was deprived of a constitutional right by being denied the assistance of counsel, there is no foundation for this in fact or support in law. He was not refused counsel, he preferred to act as his own counsel; and if there was an error committed in this regard it could only be corrected by proceedings in error. It cannot serve to secure his discharge upon a writ of *habeas corpus*.

Ex parte Yarbrough, 110 U. S., 653.
Ex parte Bigelow, 113 U. S. 328, 330.
Ex parte Harding, 120 U. S., 782, 784.
In re Wood, 140 U. S., 278, 287.

In re Jugiro, 140 U. S., 291, 297.
In re Wilson, 140 U. S., 575.
McElvain vs. *Brush*, 142 U. S., 160.
U. S. vs. *Pridgeon*, 153 U. S., 48, 62.

Respectfully submitted,

J. K. RICHARDS,
Attorney-General of Ohio.

December 12, 1894.

APPENDIX.

EXHIBIT "A."

In re McKnight.

(Circuit Court, S. D. Ohio, November 14, 1892.)

(52 Federal Reporter, p. 799.)

Taft, Circuit Judge, (Opinion):

"The sections of the statutes under which this Court exercises jurisdiction to issue the writ of *habeas corpus* have been quoted in the opinion just filed in the case of *In re Haskell*, 52 Fed. Rep., 795. This Court has no power to discharge the prisoner in the present case, unless it appears from the petition that the prisoner has been deprived of his liberty by the State of Ohio without due process of law, and has been denied the equal protection of the law, in violation of the Fourteenth amendment to the constitution of the United States, and, further, that by reason thereof the sentencing Court was without jurisdiction to pronounce the sentence. Before a Court can interfere with the judgment of another Court by *habeas corpus*, it must be able to say that the judgment is null and void.

"It is clear from the petition that the Court which sentenced the prisoner had jurisdiction of the person and of the offense charged in the indictment; that the indictment was properly found by a grand jury; that the case proceeded to trial and conviction before a petit jury; that judgment followed thereon; and that no want of jurisdiction in the Court to pronounce the sentence appears on the face of the

record. The only ground for denying the power of the Court to pronounce the judgment consists in the refusal of the Court, as alleged, to assign counsel for petitioner's defense, in accordance with the law of Ohio, and in the Court's forcing the relator to trial without sufficient time for preparation, and without giving him an opportunity, by the compulsory process of the Court, to secure the presence of his material witnesses, who were absent, and without whom he could not safely proceed to trial. Such matters are mere irregularities or errors which cannot be considered or corrected by a Court in the collateral proceedings in *habeas corpus*. They do not go to the jurisdiction of the Court to pronounce the sentence.

"The right to have the assistance of counsel is not alleged to have been infringed. The averment is that the trial Court failed or refused to assign counsel at the expense of the State, which is a very different thing. Failure to furnish counsel to a defendant is not a want of due process of law. If a State statute accords such a right to an indigent defendant, a denial of it is error, only, which does not affect the jurisdiction of the Court, or render its sentence void. Nor is the failure of the Court to allow the defendant compulsory process for the attendance of his witnesses a jurisdictional defect which can be considered on *habeas corpus*. It is doubtful from the petition whether the petitioner intends to state that the Court refused to issue compulsory process, or only that, by denying a continuance, the Court failed to give an opportunity to procure the attendance of absent witnesses. But conceding that the averment is of a refusal by the Court of a compulsory process, the petition does not make a case for *habeas corpus*. This is conclusively settled by the case of *Ex parte Harding*, 120 U. S., 782, 7 Sup. Ct. Rep., 780.

There it was averred that the prisoner was deprived of his liberty without due process of law, because at the trial in a Court of a territory of the United States the petitioner was deprived of his right to obtain compulsory process for the attendance of his witnesses, in violation of the constitution of the United States, which in Article 6 of the amendments, expressly secures such a right to persons tried in the Courts of the United States. The Court held that the objection to the sentence only went to the regularity of the proceedings, and not to the jurisdiction of the Court to impose the sentence; that for such irregularity the judgment was not void; and that the writ of *habeas corpus* gave the Court no power for its correction.

"The case of *ex parte Harding* is stronger than the case at bar, because there the Supreme Court was considering the validity of a trial and judgment in a Court organized under the authority of the United States, and the right, a violation of which was assigned as the reason for the writ, was in terms secured to the petitioner in that case by the Federal Constitution. Here the judgment under consideration is that of a State Court, and the right alleged to be violated is one not expressly secured by the Federal Constitution, but only by the Constitution and laws of Ohio. It is only indirectly protected by the fourteenth amendment to the Federal Constitution. In *ex parte Ulrich*, 43 Fed. Rep. 661, Circuit Judge CALDWELL held that the District Court of the United States had no authority, by writ of *habeas corpus*, to declare a judgment of a State criminal court a nullity, and discharge the prisoner from imprisonment imposed by it, where such Court had jurisdiction of the person, place, offense, and the case, and everything connected with it. Under these authorities, the petitioner does not state a case for the issuance of a writ, and his application is denied."

EXHIBIT "B."

In re McKnight, *Habeas Corpus.*

Opinion by Taft, J.:

The relator must be remanded. This is the second petition for *habeas corpus* filed by him in this Court. In the first petition, the grounds for his application were two; first, that the Court of Wood County had refused to assign him counsel for his defense, as required by the law of Ohio; and, second, that he had been denied the right to compulsory process for his witnesses. On the face of that petition, accompanied as it was with the indictment and journal entries showing his conviction and sentence to the Ohio State Penitentiary, for the crime of forgery, I did not think that any facts were shown divesting the Wood County Court of jurisdiction to pronounce the sentence under which the prisoner was committed. See *In re McKnight*, 52 Fed. Rep. 799.

Subsequently, the prisoner drew up another petition for the writ of *habeas corpus* and sent it to the Chief Justice, with an application for the writ to issue out of the Supreme Court. This petition was referred to me by Mr. Justice Brown under the decision of the Supreme Court in *Ex parte Mirzan*, 119 U. S., 584. The second petition was broader in its allegations than the first. The second petition alleged that the prisoner had been denied the assistance of counsel, and also that he had been denied the compulsory process for his witnesses. Because of the change of the allegations, it seemed best to issue the writ, and the prisoner has been brought in. The evidence shows beyond a doubt, that the

Court did not deny the prisoner the right of counsel, but that the prisoner had no counsel and appeared on his own behalf. The evidence satisfies me also, that the prisoner made no formal motion of any sort for the assignment of counsel, or any showing to the Court that he was without means to employ them. If he did make such a motion, and it was overruled, it is strange that he did not make the basis of his motion for a new trial. Nor does the evidence satisfy me that the prisoner was denied any right to the witnesses summoned. On the day of the trial, the prisoner says that he requested the issue of subpœnæs to persons living two hundred miles away from the place of trial. If the Court declined to issue such subpœnæs and run up the costs, when there was no prospect of obtaining the witnesses before the trial closed, this was a reasonable exercise of discretion. The prisoner claims that the trial came on without notice to him. The affidavits filed by him for a new trial do not clearly disclose the absence of such notice. A motion for continuance is usually addressed to the discretion of the Court, and certainly no such abuse of such discretion is here shown as to make it a ground for error. I do not mean to intimate by a discussion of the evidence, that it is within the province of this Court, even if the compulsory process for witnesses had been denied, to hold that the Wood County Court was without jurisdiction on that account, and therefore release the prisoner. All I mean to say is, that the evidence does not disclose that those grounds exist upon which the prisoner claims he ought to be released, whether they would in law require his release or not.

WM. H. TAFT.